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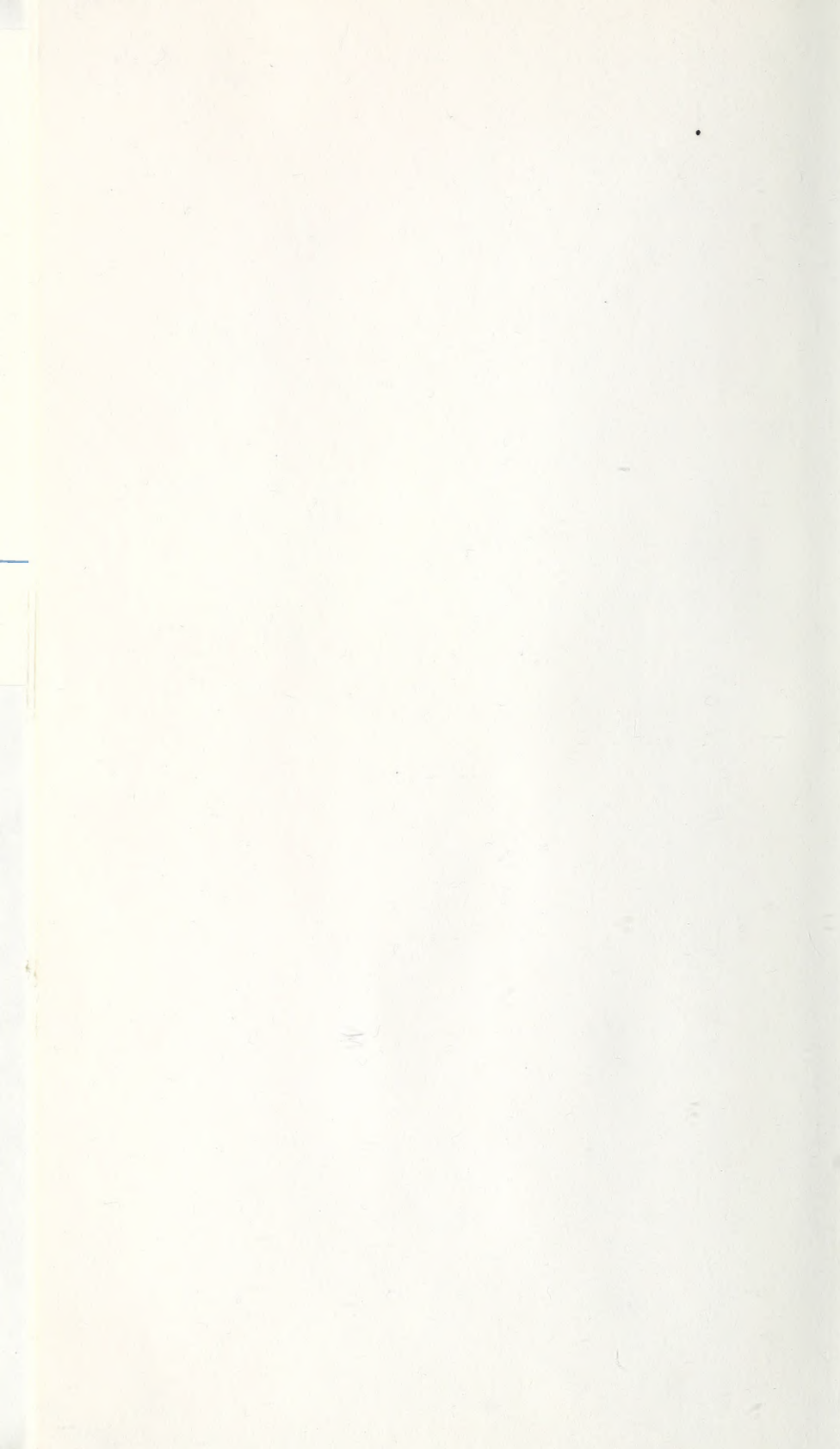


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NORTH CAROLINA
ATTORNEY GENERAL REPORTS

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ROBERT MORGAN
ATTORNEY GENERAL

NORTH CAROLINA
ATTORNEY GENERAL
REPORTS

Opinions of the Attorney General
July 1, 1973, through December 31, 1973

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THE
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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C. 20535

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5 July 1973

Subject: Criminal Law and Procedure; Record
Expunction; Minors

Requested by: Mr. Ray H. Garland
Deputy Director
State Bureau of Investigation

Questions: (1) Does Chapter 748 of the 1973 Session
Laws of the General Assembly (codified as
G.S. 15-223) apply to convictions that
occurred prior to May 23, 1973 (effective
date of the Act) or only to convictions
after that date?

(2) Does the language in Chapter 748 of
the 1973 Session Laws of the General
Assembly (codified as G.S. 15-223)
"whenever any person has not yet attained
the age of 18 years . . . " mean that the
expunction must come before the person
is 18 years of age, or does it mean that
when the person committed the crime, or
was convicted, he had not attained the age
of 18 years?

Conclusions: (1) Chapter 748 of the 1973 Session Laws
of the General Assembly (codified as
G.S. 15-223) applies to offenses which
occurred at any time.

(2) The language "whenever any person
who has not yet attained the age of 18
years . . . " means that for an individual
to qualify for a record expunction under
this act the individual must have been
under 18 years of age (17 years of age or
younger) on the date of the offense.

Chapter 748 of the 1973 Session Laws of the General Assembly

(codified as G.S. 15-223) provides the method whereby an individual meeting the age requirement set forth in the statute who has been convicted of a misdemeanor other than a traffic violation may have all records incident to the misdemeanor conviction expunged. Justice and equity make it clear that this statute applies to any conviction which meets the statutory prerequisites regardless of when that conviction occurred. The effective date of the Act, May 23, 1973, is the date after which such record expunctions can be granted. This date has no other significance as to the applicability of the statute other than providing the beginning time for record expunctions.

As to the second question, it appears clear from the statute that in order to qualify the individual must have been under the age of 18 years (17 years of age or younger) on the date the offense was committed. Any individual who is 18 years of age or older on the date he commits the offense would not qualify for record expunction under the statute.

Therefore, it is the opinion of this Office that Chapter 748 of the 1973 Session Laws of the North Carolina General Assembly (as codified in G.S. 15-223) is effective for offenses which occurred at any time. Furthermore, it is the opinion of this Office that in order for an individual to qualify for the record expunction set forth in this statute the individual must have been under 18 years of age (17 years of age or younger) on the date of the commission of the offense for which record expunction is sought.

Robert Morgan, Attorney General
Henry E. Poole,
Associate Attorney

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6 July 1973

Subject: Elections; New Registration; Not Permitted
Except When Records are Destroyed or
Lost by Fire, Theft or Other Hazard;
G.S. 163-78.

Requested by: Mrs. Edna W. Koontz
Executive Secretary
Caldwell County Board of Elections

Question: Where a municipality has not had a new voter registration for over 30 years, and street names and numbers have been changed, may a new voter registration be ordered to bring the registration up to date?

Conclusion: No.

A new registration of voters may not be held in a city, town or county except when the registration records have been lost or destroyed by fire, theft or other hazard. G.S. 163-69 provides that no new registration shall be ordered either by precinct or countywide unless the permanent registration certificates have been lost or destroyed by theft, fire or other hazard. G.S. 163-78 contains the procedure and authority for a new registration, but only when the registration records have been lost or destroyed by fire, theft or other hazard.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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6 July 1973

Subject: Municipalities; Elected Officials; Increasing Salary; Time; G.S. 160A-64(a)

Requested by: Mrs. Arlene G. Talton
Clerk of the Town of Mount Olive

Question: When may the salaries of elected officials of a municipality be increased pursuant to G.S. 160A-64?

Conclusion: When the annual budget becomes effective.

G.S. 160A-64(a) was rewritten by the 1973 General Assembly to provide:

"The council may fix its own compensation and the compensation of the mayor and any other elected officers of the city by publication in and adoption of the annual budget ordinance, but the salary of an elected officer other than a member of the council may not be reduced during the then current term of office unless he agrees thereto."

Thus, it is clear that the council may fix its own compensation, the compensation of the mayor and any other elected officer when it adopts the annual budget ordinance and any increase would become effective for the new budget year.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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6 July 1973

Subject: Parole; Life Sentences; G.S. 148-58

Requested by: Mr. J. Mac Boxley, Chairman
North Carolina Board of Paroles

Question: Does the North Carolina Board of Paroles possess the statutory authority to parole a prisoner serving a sentence of life imprisonment when the prisoner has served ten years of his sentence?

Conclusion: Yes.

G.S. 148-58 provides:

"All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that *any prisoner serving sentence for life shall be eligible for such consideration when he has served ten years of his sentence*. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits." (Emphasis added.)

In construing this particular proviso, the Supreme Court of North Carolina accepted the unambiguous language of the statute by stating in *State v. Conner*, 241 N.C. 468 (1955) that "By virtue of G.S. 148-58 any prisoner serving a sentence for life 'shall be eligible' for a hearing upon his application for parole when he has served ten years of his sentence." Therefore, it would appear that although the Board of Paroles has historically felt as a matter of policy that the Governor should first commute the sentence of a prisoner serving a life sentence to a term of years (usually 40 years) before reviewing such an individual for parole consideration, the General Assembly has authorized the Board of Paroles to exercise its parole authority in all cases when the prisoner has served a fourth of his sentence - or after ten years when the prisoner is serving a sentence for life.

Robert Morgan, Attorney General
Jacob L. Safron,
Assistant Attorney General

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10 July 1973

Subject: Training and Standards Council Act;
G.S. 17A-1, *et seq.*; Application

Requested by: Mr. John Faircloth
Director

Criminal Justice Training
and Standards Council

Questions:

(1) Do the provisions of Chapter 17A require that all criminal justice officers be appointed, trained and certified as prescribed in the regulations adopted by the Training and Standards Council, or is the Act a voluntary program?

(2) If the Act is mandatory, would failure to comply with the statutes and regulations nullify the police powers of an officer even though he had been sworn in?

Conclusions:

(1) The Act is mandatory. Statutes should be considered in light of the language of the statutes, the spirit of the Act and what the Act seeks to accomplish. *Stevenson v. Durham*, 281 N.C. 300. G.S. 17A-6(3) confers upon the Training and Standards Council the power to "certify persons as being qualified under the provisions of this chapter to be criminal justice officers." G.S. 17A-6(10) confers the power upon the Council "to make such evaluations as may be necessary to determine if governmental units are complying with the provisions of this chapter." G.S. 17A-7(a) provides "(i)t is the intent of this chapter that *all* officers employed, after the Council has adopted the required standards, *shall meet the requirements of this chapter.*" (Emphasis added.)

(2) No. The police officer would be a *de facto* officer once he had been certified, sworn into office, and has been recognized by officials and the public generally as holding the office. The right of a *de facto* officer to act cannot be collaterally

attacked. His acts will be held valid upon principles of policy and justice as to third persons. The Council could withdraw the certification and the officer be discharged from employment.

The Supreme Court of North Carolina has spoken often on the subject of *de facto* officers. Former Chief Justice Parker discussed the acts of *de facto* officers in *State v. Porter*, 272 N.C. 463. He wrote:

" . . . Daniel S. Walker was a *de facto* justice of the peace under the rule that a person is a *de facto* officer where the duties of the office were exercised 'under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.' *State v. Lewis*, 107 N.C. 967, 12 S.E. 457, 13 S.E. 247, 11 L.R.A. 105; *Hinson v. Britt*, 232 N.C. 379, 61 S.E.2d 185. The words in quotation marks set forth in *State v. Lewis*, *supra*, are quoted from the scholarly and exhaustive opinion by Chief Justice Butler of the Supreme Court of Connecticut in the leading case of *State v. Carroll*, 38 Conn. 449, 9 Am.Rep. 407.

"A comprehensive definition of a *de facto* officer is found in *Waite v. Santa Cruz*, 184 U.S. 302, 323, 46 L.Ed. 552,566, as follows:

"' . . . A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.'

"The same general idea has been expressed by this Court in *State v. Lewis, supra*.

"The acts of a *de facto* officer are valid in law in respect to the public whom he represents and to third persons with whom he deals officially. *In re Wingler*, 231 N.C. 560, 58 S.E.2d 372; *Hinson v. Britt, supra*.

"We held as far back as 1844 in an opinion bearing the illustrious name of Chief Justice Ruffin in the case of *Gilliam v. Reddick*, 26 N.C. 368, as correctly summarized in the headnote, as follows:

"'The acts of officers *de facto*, acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual, when they concern the rights of third persons or the public, as if they were the acts of rightful officers.'

"In *State of Delaware v. Ronald D. Pack* (Superior Court of Delaware), 188 A.2d 524, the Court held, under a statute substantially similar to our G.S. 7-114.1, as correctly summarized in the second headnote, as follows:

"'A party who was properly appointed to office of justice of the peace under a valid certificate of appointment under which he took office and exercised powers thereof openly and notoriously for about two months was a *de facto* officer, and his official act in hearing and disposing of charge against defendant of operating an automobile at an excessive rate of speed could not be attacked collaterally by defendant through motion to dismiss the information on ground such party was not a justice of the peace on date of the trial in that he had failed to file statutory bond.'

. . . .

" . . . The Court in *In re Wingler, supra*, further said:

"The *de facto* doctrine is indispensable to the prompt and proper dispatch of governmental affairs. Endless confusion and expense would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action. An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. The administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office.'"

Thus, so far as the public and third parties are concerned, a *de facto* officer is competent to do whatever may be done by an officer *de jure*. Therefore, where a police officer has been certified by the Council, duly sworn into office, his acts are valid although he did not possess the qualifications required under Chapter 17A of the General Statutes. Of course, the Council could revoke its certification and the person be discharged from employment.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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11 July 1973

Subject: Courts; Juveniles; Commitment, Term of;
Release, Authority for

Requested by: Dr. John Larkins
Commissioner
N. C. Department of Youth Development

Questions: (1) May any delinquent child who is
committed by a juvenile court to the Office

of Youth Development, Department of Social Rehabilitation and Control, for placement in a residential program operated by the Department be committed for either a definite or an indefinite term?

(2) If a juvenile court can and has committed a delinquent child to the Office of Youth Development, Department of Social Rehabilitation and Control, for placement in a residential program operated by the Department, and the commitment is for a definite term, may the Department release him prior to expiration of that term?

Conclusions:

(1) Any delinquent child who meets the criteria established by G.S. 7A-286(5) may be committed by the juvenile court to the Office of Youth Development, Department of Social Rehabilitation and Control, for placement in a residential program operated by that Department for either a definite or an indefinite term.

(2) When a juvenile court has committed a delinquent child to the Office of Youth Development, Department of Social Rehabilitation and Control, for placement in one of the residential programs operated by the Department, and such commitment is for a definite term, the Department nevertheless may release him prior to expiration of that term upon Departmental determination that the release is appropriate within the purview of G.S. 7A-286(5)d.

These questions have arisen due to a seeming statutory conflict resulting from the amendment engrafted on G.S. 7A-286 by the 1973 General Assembly. G.S. 134-14, which is obviously designed

to insure that the Office of Youth Development is in a position to care for offenders committed to it, specifies, *inter alia*, as follows:

"No commitment shall be made for any definite term but any person so committed may be released or discharged at any time after commitment"

However, as amended by the last General Assembly, G.S. 7A-285(5) provides:

"(5) In the case of a child who is delinquent, the court may commit the child to the Office of Youth Development, Department of Social Rehabilitation and Control, for placement in one of the residential programs operated by the Department, provided the court finds that such child meets each of the following four criteria for commitment to an institution and supports such finding with appropriate findings of fact in the order of commitment as follows:

- a. The child has not or would not adjust in his own home on probation or while other services are being provided;
- b. Community-based residential care has already been utilized or would not be successful or is not available;
- c. The child's behavior constitutes some threat to persons or property in the community or to the child's own safety or personal welfare;
- d. If the child is less than 10 years of age or his offense would not be a crime if committed by an adult, the court must find that all community-level alternatives for services and residential care have been exhausted.

Said commitment shall be for a definite term or an indefinite term, not to extend beyond the eighteenth birthday of the child, as the Department or its

administrative personnel may find to be in the best interest of the child. The Department, or its administrative personnel, shall have final authority to determine when any child who has been admitted to any program operated by the Department has sufficiently benefitted from the program as to be ready for release. If the Department finds that any child committed to its care is not suitable for any program operated by the Department, the Department shall have the right to make a motion in the cause so that the court may enter an alternative disposition."

From the unambiguous language used, it is clear that the 1973 General Assembly desired to create a situation whereby the juvenile court may, in its discretion, commit any child found to be delinquent who meets the four criteria delineated in the present G.S. 7A-286(5). Further, resolving any conflict in these statutes in favor of the latest expression of legislative intent, these commitments may now be for either a definite or indefinite period of time - - with the proscription that they may not extend beyond the eighteenth birthday of the individual concerned. That is not to say, however, that the specifying of a definite period of time by the juvenile court makes such term mandatory. Quite to the contrary, it is patent that the ultimate decision as to the release date of the delinquent child will still be made by responsible personnel within the Department of Social Rehabilitation and Control based upon "the best interest of the child" and a determination as to when the child "has sufficiently benefitted from the program as to be ready for release."

One further aspect of these conclusions is worthy of comment. The constitutionality of committing a delinquent child for placement in a residential program for an indefinite period limited only by the age of majority has long since been established. See *In re Burris*, 275 N.C. 517, 533-534 (1969); *In re Whitcraft*, 8 N.C. App. 154, 161-162 (1970). However, when a juvenile court has committed a delinquent child for placement in a residential program for a definite period, retaining him in that program beyond the term of that period without an additional hearing would appear to be violation of the Due Process Clause of the U.S. Constitution.

It is noted that some confusion appears to exist relative to the correct name of the responsible agency involved here; i.e., G.S. 7A-286(5), as amended, refers to the "Office of Youth Development", G.S. 134-1, *et seq*, refers to the "State Department of Youth Development", and the Executive Organization Act of 1971 refers to the "State Board of Juvenile Correction." Nevertheless, it is clear that all statutes are intended to deal with the subordinate agency within the Department of Social Rehabilitation and Control charged with responsibility for operating the residential program for delinquent children.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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11 July 1973

Subject: Corporations; Nonprofit Corporation Act;
Constitution, Article VIII, Section I;
Ability of Nonprofit Corporation
Organized by Legislative Act to Amend its
Charter.

Requested by: Mr. Jack Styles
Corporations Attorney
Department of the Secretary of State

Question: Does the Board of Directors of a nonprofit
private corporation whose original charter
was confirmed by private act of the
General Assembly and whose charter
heretofore has been amended by private act
of the General Assembly have the authority
to amend its own charter?

Conclusion: The Board of Directors of such a nonprofit
corporation which is not under the
patronage and control of the State of
North Carolina possesses exclusive

authority to amend the corporation's charter pursuant to Chapter 55A of the General Statutes.

The corporation in question is the Oxford Orphanage, a charitable corporation whose charter was issued by the Granville County Superior Court on December 11, 1895. The corporation's charter was subsequently ratified and confirmed by the General Assembly in Chapter 132, Private Laws of 1895. Subsequently, the charter of the Oxford Orphanage was restated or amended or both by Chapter 119, Private Laws of 1923; Chapter 60, Session Laws of 1953 and Chapter 130, Session Laws of 1973.

Due to the fact that acts of the General Assembly are presumed to be valid, it is not necessary in rendering this opinion to discuss or speculate as to whether a court would declare these individual acts of the General Assembly to be in contravention of Article VIII, Section I of the Constitution of North Carolina which reads as follows:

"Section 1. *Corporate charters.* No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering, organization, and powers of all corporations, and for the amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general acts may be altered from time to time or repealed. The General Assembly may at any time by special act repeal the charter of any corporation."

In reaching a conclusion as to the present authority of the Board of Directors to amend the charter of the Oxford Orphanage, Article VIII, Section I of the Constitution of North Carolina, G.S. 55A-3 and Chapter 60, 1953 Session Laws, Sec. 10, must be read and construed together. G.S. 55A-3 reads as follows:

"55A-3. *Applicability of chapter.*-(a) The provisions

of this chapter relating to domestic corporations shall apply to:

- (1) All corporations hereafter organized under this chapter.
- (2) All nonprofit corporations heretofore organized under any act hereby repealed, except nonprofit corporations having capital stock.
- (3) All nonprofit corporations without capital stock heretofore or hereafter organized under any other act, unless there is some other specific statutory provision particularly applicable to such corporations or inconsistent with some provisions of this chapter, in which case that other provision prevails. Nothing herein shall apply to hospital and medical service corporations as defined in Chapter 57 of the General Statutes which were incorporated prior to July 1, 1957, or repeal or modify the provisions of G.S. 54-138.

(b) The provisions of this chapter relating to foreign corporations shall apply to all such corporations conducting affairs in this State for purposes for which a corporation might be organized under this chapter."

Chapter 60, Session Laws of 1953, Sec. 10, reads as follows:

"Sec. 10. The directors of said corporation shall be elected or appointed as follows: Five directors shall be elected by the Grand Lodge of Ancient, Free and Accepted Masons of North Carolina, and such directors shall hold office for such terms as shall be determined by the Grand Lodge, and the Grand Master of Masons in North Carolina, or the acting Grand Master, shall be ex officio a director and chairman of the board

of directors; three directors shall be appointed by the Governor of the State of North Carolina, and such directors shall hold office for such terms as shall be determined by the bylaws of the corporation: Provided, that if at any time, the appropriation towards the support of the Orphanage now made by the State shall cease, all of the directors shall be selected by the said Grand Lodge. The present board of directors of Oxford Orphanage who were appointed in the manner set forth above, shall be directors of 'Oxford Orphanage,' the corporation hereby created, until their successors shall be elected or appointed."

The quoted provision of the Consitution of North Carolina denies to the Legislative branch the authority to amend by special act the charters of corporations unless the corporation is one for a charitable, educational, penal or reformatory purpose and unless that corporation is to be and remains under the patronage and control of the State of North Carolina. This section of the Constitution further directs that the General Assembly shall provide by general legislation for the chartering of all corporations and for the amending, extending and forfeiture of their charters, except as to those charitable, educational, penal and reformatory corporations which fall under the patronage and control of the State.

The charter of the Oxford Orphanage provides that there shall be eight directors of the corporation. Five of these directors shall be appointed by the Grand Lodge of Ancient, Free and Accepted Masons of North Carolina. Three of these directors shall be appointed by the Governor of North Carolina. The right of the State to appoint a minority of the directors of this corporation by no means gives the State the control of the corporation necessary to bring it within the exception to Article VIII, Section I of the North Carolina Constitution. Therefore, this corporation is one of those for which the General Assembly was directed to provide, and for which it has provided, by general law, procedures for chartering and for charter amendment.

Thus, pursuant to the general law, i.e., G.S. 55A-3(a)(3), the directors of the Oxford Orphanage possess the sole authority and power to amend the charter of the Oxford Orphanage.

Robert Morgan, Attorney General
Russell G. Walker, Jr.,
Assistant Attorney General

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11 July 1973

Subject: Motor Vehicles; Criminal Law and
Procedure; Double Jeopardy

Requested by: Honorable George M. Harris
District Court Judge
Seventeenth Judicial District

Questions: Defendants were arrested and tried upon
a charge of spontaneous speed competition.
At the close of the evidence of the State,
motion as of nonsuit by the defendant was
allowed. Subsequent thereto, the arresting
officer swore to new warrants charging
defendants with speeding violations arising
from the same occurrence.

(1) Is the speeding charge a lesser included
offense?

(2) Will the prior prosecution for
spontaneous speed competition support a
plea of former jeopardy?

Conclusions: (1) No. The test of a lesser included offense
is that where an offense cannot be
committed without necessarily committing
another offense, the latter is a lesser
included offense. The offense of
spontaneous speed competition may be
committed without the elements essential
to the offense of a G.S. 20-141 speeding
offense.

(2) No. Where an accused has been once placed in jeopardy, the conviction or jeopardy is a bar to another prosecution for an offense necessarily included in the greater offense. However, a speeding offense is a separate offense not necessarily included in a spontaneous speed competition offense.

Where the same act constitutes a violation of two statutes and, in addition to any common elements, an additional element must be proved in *each* which is not required in the other, the offenses are not the same in law and in fact, and conviction or acquittal in the one will not support a plea of former jeopardy in the other. *State v. Birckhead*, 256 N.C. 494, 124 S.E.2d 838 (1962). The same act of driving that includes speeding and racing gives rise to two statutory offenses, *each* of which requires the proof of an additional element foreign to the other. Specifically, G.S. 20-141 requires speeding in excess of the statutory limit, while G.S. 20-141.3 does not. Conversely, G.S. 20-141.3 requires speed competition, while G.S. 20-141 does not. Under the foregoing analysis the principle of former jeopardy has no application. Distinguishable are those cases where only *one* of the two statutory offenses requires the proof of an additional fact, in which the presence of both a lesser included and greater offense gives rise to the application of the principle of former jeopardy.

See 22 C.J.S. *Crim. Law* § 283 (1961).

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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11 July 1973

Subject: Municipalities; Streets and Highways;
Speed Bumps

Requested by: Mr. Nelson W. Taylor
Attorney for Town of Morehead City

Questions:

(1) What authority, if any, does the municipality have to place raised mounds for "speed bumps" in streets as a traffic control measure?

(2) Is the municipality liable for damages in the event of injury even if painted, readily visible signs are posted giving notice of such bumps?

(3) Would a person be denied recovery by his own negligence if it could be shown that he exceeded the speed limit, and no damage would result if a vehicle could be driven across the "bumps" at a speed within the speed limit without any damage?

Conclusions:

(1) Although the municipality has authority to regulate and control traffic on municipal streets under the authority of G.S. 160A-296 and G.S. 160A-300, it has no authority to place "speed bumps" in the street which may obstruct traffic.

(2) The municipality may be held liable for injuries occasioned by the placing of "speed bumps" in the roadway in violation of its duty to keep the streets free of obstructions. The facts in each case of an accident would determine the municipality's liability. Although the defense of contributory negligence may be available against a driver of a vehicle, it may not be available to the City as against injured passengers of such vehicles or others injured thereby.

(3) The answer is the same as Conclusion (2).

There appear to be no North Carolina cases concerning a municipality's use of "speed bumps" as a traffic control device. However, in our opinion, the reasoning expressed by the Mississippi Supreme Court concerning "speed bumps" for the control of traffic is applicable. In the case of *Vicksburg v. Harralson*, 136 Miss. 872, 101 So. 713, 39 ALR 777 (1924), the municipality was held liable for negligently erecting and maintaining a "bumper" in the street for the purpose of slowing vehicular traffic and warning of a dangerous intersection. The court is quoted in that case as follows:

"We do not think the city had a right to place a dangerous device or obstruction in its street making it unsafe, and which would likely injure persons traveling in automobiles over it.

"This scheme or method of warning drivers appears to us to be unreasonable, too drastic, and perilous for the purpose intended. The method of injuring one person in order to prevent damage to another is wrong in principle, as we see it, and is not such a reasonable regulation for the public safety as is warranted under the law, but is negligence. Creating one danger to prevent another is not in accord with the public safety."

A municipality has authority under the provisions of G.S. 160A-296 and G.S. 160A-300 to regulate and control traffic by traffic control devices. The placing of "speed bumps" in the roadway to control traffic where it is likely to cause injury appears to be an unreasonable traffic control device. The municipality also has the duty of keeping the streets free from unnecessary obstructions. G.S. 160A-296. A municipality does not have the discretionary power to put obstructions in its streets which are likely to injure travelers and it may be liable to one injured by "speed bumps" placed in the street by the municipality. *Graham v. Charlotte*, 186 N.C. 649. G.S. 160A-296.

Questions concerning liability imposed are troublesome questions which are continually arising in determining how far a court will go in declaring certain conduct of a defendant negligent or not negligent and certain conduct of a plaintiff contributory negligent,

or not contributory negligent. The facts in each case would determine the municipality's liability. 40 CJS Highways, Section 257; 39 Am.Jur.2d, Highways par. 486, p. 881. The driver of a vehicle where the "speed bumps" are posted as described in questions (2) and (3) may be barred from recovery by contributory negligence on his part. However, passengers in the vehicle and others injured thereby may not be. When two causes combine to produce an injury to a traveler on a highway, both of which are in their nature proximate - the one being a comparable defect in the highway, and the other some other occurrence for which neither party is responsible - the municipality is liable, provided that the injury would not have been sustained but for such defect. *Dillon v. Raleigh*, 124 N.C. 184.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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11 July 1973

Subject: Motor Vehicles; Operation of Trucks;
Securing of Loads

Requested by: Mr. Boyd C. Miller, Jr.
Administrator
Office of Transportation Safety

Question: May an officer cite an operator of a property carrying vehicle under the provisions of G.S. 20-116(g) or G.S. 20-120 prior to the loss of a part of his load?

Conclusion: Yes.

G.S. 20-116(g) provides:

"(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting,

leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

"Trucks, trailers or other vehicles when loaded with rock, gravel, stone or other similar substances which could blow, leak, sift or drop shall not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point, or if not so loaded, unless the load shall be securely covered by tarpaulin or some other suitable covering, or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

"Provided this section shall not be applicable to or in any manner restrict the transportation of poultry or livestock."

G.S. 20-120 provides in pertinent part:

"§ 20-120. *Operation of flat trucks on State highways regulated; trucks hauling leaf tobacco in barrels or hogsheads.*—It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the State any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck

. . . .

"Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court."

Under the provision of G.S. 20-116(g), a truck or other vehicle when

loaded with rock, gravel, stone or other similar substances which could blow, leak, sift or drop must load within the six inch specification set out therein when operated on the highway or be in violation. Further, if any of the aforementioned materials or substances in fact flow, leak, sift or drop from the vehicle when being operated, a violation occurs. Under this section, the operator would be chargeable for either of the offenses and such offenses are by the provisions of G.S. 20-176(b) made misdemeanors punishable by a fine not to exceed \$50.00 or imprisonment not to exceed 30 days.

Under the provision of G.S. 20-120, the failure to secure the load on the vehicle before operating on the highway is an offense, whether any portion of the load is lost or not. It is to be noted that under this section either the operator or owner may be charged with the violation and under the provisions of G.S. 20-176(b) such violation is punishable by a fine not to exceed \$100.00 or imprisonment not to exceed 60 days.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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11 July 1973

Subject: Social Services; Juveniles; Courts,
Jurisdiction Over Undisciplined and
Delinquent Children Over Sixteen Years of
Age

Requested by: Honorable Tom H. Matthews
District Court Judge
Seventh Judicial District

Question: If a child between the ages of 16 and 18
years has been found to be undisciplined
and placed upon probation, does a juvenile
court have the authority to find him to be
a "delinquent child" based upon a violation
of this probation?

Conclusion:

If a child between the ages of 16 and 18 years has been found to be undisciplined and placed upon probation, a juvenile court has the authority to find him to be a "delinquent child" based upon a violation of this probation.

The answer to this question is to be found in the provisions of G.S. 7A-278 and G.S. 7A-286, both as amended by the 1973 General Assembly. As pertinent to this issue, the first of these statutes now reads:

"§ 7A-278. *Definitions.*—The terms or phrases used in this Article shall be defined as follows, unless the context or subject matter otherwise requires:

- (1) 'Child' is any person who has not reached his sixteenth birthday. Provided, that for the purposes of subdivision (5) of this section, 'child' is any person who has not reached his eighteenth birthday, and is not married, emancipated or a member of the armed forces of the United States.
- (2) 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated the conditions of his probation under this Article.

.

- (5) 'Undisciplined child' includes any child who is unlawfully absent from school, or who is regularly disobedient to his parents or guardian or custodian and beyond their disciplinary control, or who is regularly found in places where it is unlawful for

a child to be, or who has run away from home."

The present question has arisen from the proviso dealing with children under eighteen years of age which was added to G.S. 7A-278(1) by the 1973 General Assembly, and it is understandable how literal reading of this proviso, standing alone, might negate the exercise of jurisdiction over delinquent children over sixteen years of age.

However, other portions of Chapter 7A of the General Statutes must be considered as bearing upon this issue. One of these other pertinent provisions is found in G.S. 7A-286(4)(b) which authorizes the juvenile court to place a child who is either delinquent or undisciplined on probation for whatever period of time and subject to whatever conditions the court shall specify. Finally, the second paragraph of G.S. 7A-286 contains the following significant language:

"In any case where the court adjudicates the child to be delinquent, undisciplined, dependent or neglected, the jurisdiction of the court to modify any order of disposition made in the case shall continue during the minority of the child or until terminated by order of the court, except as otherwise provided herein "

In view of the inclusion of a probation violator among those children who may be found to be delinquent plus the above quoted provisions for the juvenile court retaining jurisdiction during the minority of the child involved, it is clear that, in the situation described by the current question, the court is empowered to make a finding of delinquency and order appropriate disposition of the individual case.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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13 July 1973

Subject: Environmental Policy Act of 1971;
Application to Ongoing Projects; Threshold
Determination; Interpretation of State
Environmental Policy; N.C. State
Government Center

Requested by: Mr. Carroll L. Mann, Jr.
State Property and Construction Officer

Questions: (1) Is the Environmental Policy Act of
1971 applicable to the North Carolina
State Government Center?

(2) Who must make the preliminary or
threshold decision to write an
Environmental Impact Statement within
the meaning of the Environmental Policy
Act?

(3) What factors must be considered in
making the preliminary or threshold
determination to write an Environmental
Impact Statement?

(4) What procedures must the State agency
follow in making a report of the threshold
determination?

Conclusions: (1) Yes. On the effective date of the
Environmental Policy Act, money for the
construction of the project had not been
appropriated and thus the project had not
reached that stage of completion where the
costs of abandoning or altering the project
clearly outweighed the benefits which
could flow from the compliance with the
Act.

(2) The North Carolina Capital Planning

Commission. The Capital Planning Commission is the State agency charged with the duty of developing the State Government Center.

(3) The State agency must consider all relevant environmental factors in determining whether the State project or program involves the expenditure of public moneys and also whether the project or program significantly affects the quality of the environment of North Carolina.

(4) The State agency should present its threshold determination in written memorandum form after a public hearing using previously determined administrative procedures.

This inquiry is concerned with the applicability of the North Carolina Environmental Policy Act of 1971, G.S. 113A-1 *et seq.*, to the North Carolina Capital Planning Commission, an agency under the Department of Administration, whose duty it is to plan and develop additional State governmental facilities in the City of Raleigh and the immediate area. In particular, the inquiry is concerned with the applicability of the Environmental Policy Act to the North Carolina State Government Center located within a two to three block area north of the Legislative Building on Halifax Street in Raleigh.

The property in question is part of a larger area in Raleigh for which the Department of Administration was authorized in 1969 by the General Assembly to acquire for the purposes of expanding the State governmental facilities. (G.S. 14-22.1(3)) Though the authority was given to the Department of Administration in 1969 to acquire the property in question, not until 1971 was any money appropriated for the planning of the development. The amount appropriated was \$200,000. With the money appropriated, plans for the general development of the authorized area of the State Government Center and the specific development of the first phase of the Center were adopted by the Capital Planning Commission in December, 1971.

In 1973, the General Assembly again appropriated additional money for the further development of the Center in the amount of \$9,795,000 for the implementation and construction of the first phase. Other appropriations in 1973 included the \$425,000 for the complete planning of a second major office building, a vehicular parking deck, and a motor pool dispatching center.

Land acquisition for the most part has taken place separate and apart from the planning and construction appropriations in the area in question by the Department of Administration. However, the land acquisition as of October 1972 was 70 percent complete due to previous acquisitions such as the present new Legislative Building and other State buildings including the Administration, Archives and History, Albemarle and Bath Buildings. Within the area in question, the majority of the land has been acquired at the time of this opinion.

Since the effective date of the Environmental Policy Act of 1971 is October 1, 1971, the first question that must be raised determining the applicability of the Act to the project in question is whether the Act applies at all since the project was in progress prior to the Act's effective date.

This question has been raised under the National Environmental Policy Act, 42 USCA §4321 *et seq.*, the federal Act that the State Environmental Policy Act traced with very few exceptions almost verbatim. Since the two Acts are extremely similar, unless the State Act differs substantially from the federal Act in its wording, the legal reasoning of the federal courts in interpreting the federal Act applies to the State Act also. Considering the applicability of the Act to ongoing projects, the appellate court in *Arlington Coalition v. Volpe*, 458 F 2d 1323, 1332 (4th Cir. 1972), held that when considering the Congressional command that the Act be complied with "to the fullest extent possible", an ongoing project is subject to the requirements of the Act until it has reached that stage of completion where the cost of abandoning or altering the proposed project clearly outweighs the benefits which could flow from compliance with the Act. Since the State Act also directs that the statute be acted upon "to the fullest extent possible", the legal reasoning of the *Arlington* court applies to the North Carolina Act also.

In applying the reasoning to the facts at hand, the only action on the project that occurred prior to October 1, 1971, was the authorization in 1969 by the General Assembly to the Department of Administration to acquire lands for expanding State facilities. The next step in the project was in 1971 when the General Assembly appropriated \$200,000 for the development of plans for the project. These plans were adopted in December, 1971, two months after the effective date of the statute. Since the effective date of the project, over \$10,000,000 has been appropriated for construction and more planning. Absolutely no buildings have been built or begun construction as of the date of this opinion.

Therefore, when considering the mandate of the General Assembly to take into consideration the environmental aspects of certain State projects and since the majority of the work on the project has not commenced even as of the present date, it appears to be no question that the Act applies in the case at hand. As a matter of law, the project in question has not reached that stage of completion where the costs of abandoning or altering the proposed project clearly outweigh the benefits which could flow from compliance with the Act.

Since the Act does apply and is not excluded by reason of the effective date of the statute, the next question that must be raised is whether the substantive provisions of the Act which require a detailed statement of the environmental factors of a project apply to the case at hand. In answering this question, it should be emphasized that not all State projects require the detailed statement of environmental considerations set out in the statute. The statute requires a detailed consideration of the environmental factors only after preliminary or "threshold determination" has been made that the project or program contemplated is one that:

- (1) Involves the expenditure of public moneys, AND
- (2) The project or program significantly affects the quality of the environment of North Carolina. G.S. §113A-4(2).

However, it should be noted here that this preliminary or "threshold determination" of whether an environmental impact statement is

required cannot be made by any authority other than the agency charged with the duty of developing the project or program. The Environmental Policy Act itself requires that the agency must make the initial decision. On this requirement of the agency making the "threshold determination", the statute reads:

"§ 113A-2. *Purposes.*—The purposes of this Article are:
. . .to require *agencies* of the State *to consider* and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys;" (Emphasis added)

Also, the Act states further that:

"The General Assembly authorizes and directs that, to the fullest extent possible:

. . . .

(2) Any *State agency* shall include *in every recommendation or report* on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the *responsible official* setting forth the following:

- a. The environmental impact of the proposed action;
- b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;
- c. Mitigation measures proposed to minimize the impact;
- d. Alternatives to the proposed action;
- e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and
- f. Any irreversible and irretrievable

environmental changes which would be involved in the proposed action should it be implemented." G.S. § 113A-4 (Emphasis added)

Thus, it is clear from the general pattern of the Act that the General Assembly intended to place the burden on the State agency, through its responsible official, to make the initial decision whether the detailed statement required by the Act is applicable in any agency action which involves expenditure of public moneys. The "threshold determination", as will be demonstrated, is not solely a question of law but involves reasoning in areas of expertise that only the agency involved with the project has. Because the initial decision could involve a good deal of investigation of the pertinent facts involved in the project, a rule requiring the involved agency to make the ultimate decision is not only logical but it is also very pragmatic and workable.

Furthermore, the reasoning that the agency in charge of the proposed project is the party authorized to make the threshold determination has been made in a federal appellate court on a similar fact situation. In *Hanley v. Mitchell*, 460 F 2d at 644 (5th Cir. May 17, 1972), the court held that because the agency was responsible for the acquisition of the site, the design and construction of the buildings and their ultimate operation, it was the appropriate body to make the original determination as to the environmental impact. The reasoning of the court was that the agency is the proper party to conduct the screening function because of the general pattern of the Act. The reasoning in this case applies in the State Environmental Policy Act because the pattern of both Acts is similar. In the case at hand, then, the North Carolina Capital Planning Commission is the agency that must make the threshold determination.

Since the agency involved with the project is the proper party to make a threshold determination of whether to go forward and develop a detailed environmental statement, the next logical question, or series of questions, is what factors should the agency take into consideration in meeting the two statutory requirements.

The first requirement that must be met in making the threshold determination is that the project must involve the expenditure of

public money. In determining whether the first requirement has been met, it appears that an objective determination can be made. Since the detailed statement is required only if the project or program involves public money, a check on the various appropriation measures in the General Assembly could determine whether public money is involved. Thus, if public money has been appropriated to an agency for a particular project, the first criteria is met.

However, it should be emphasized that the first requirement is not met simply if some agency official's salary is paid out of the general fund; for example, advisory services. Public moneys must be appropriated and spent for the particular project in order to come within the requirement of public money expenditure. See 41 N.C.A.G. 871.

The second statutory requirement for determining whether the detailed environmental statement must be written is that the project in question, in addition to involving public money, must significantly affect the quality of the environment of North Carolina. This phrase must be broadly construed to give effect to the purposes of the State Environmental Policy Act.

The purposes of the Act and the environmental policy of the State are set out in the Act in G.S. 113A-2 and G.S. 113A-3. For instance, in these two sections of the Act, the statute states that the General Assembly recognizes that the present generation is a "trustee for future generations" to assure that the natural environment of high quality will be maintained. The natural environment includes not only the physical surroundings which consist of the plant and animal life and the geographical setting, but also includes the air and water the people of the State breathe and drink.

Another policy statement found in the Act states that the State shall seek ". . .for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings." This policy statement means that the State will seek to prevent the various pollutions existing in the urban society such as the air pollution, water pollution, noise pollution, all of which cause injury to the physical well-being of the citizens of the State. Also, the State wishes to promote aesthetically pleasing surroundings and thus prevent another type of pollution that hinders the natural environment; unsightly

man-made developments such as buildings not designed in conjunction with the surroundings.

Another specific statutory policy statement on the environment is that the State will seek ". . .to preserve the important historic and cultural elements of our common inheritance." As generally used, historic and cultural elements are, for example, buildings, Revolutionary or Civil War battle sites, monuments, or even areas such as Fort Macon near Beaufort, North Carolina.

It should be emphasized that though specific examples of the environmental purposes and policies of the State have been stated above, these examples are in no way all inclusive. Because of the general and broad language of the Act, all the environmental aspects of a particular project should be considered when attempting to reach a threshold determination. The exact number of relevant factors that must be considered must be determined on a case by case approach.

Thus, the environmental policy of the State is broad and intended to encompass virtually every meaning of the word environment. It could be stated, then, that every State program, no matter how limited in scope, could cause *some* adverse effect on the environment. However, the General Assembly did not intend to make the Act apply to every State project but only to projects "significantly affecting" the environment.

Since the term "significantly" is by its very nature vague and general, and, therefore, not precise, much litigation has developed in the federal courts in interpreting the analogous section in the National Environmental Policy Act. 42 USCA 4333(c). The most recent interpretation of this key element of an agency threshold determination is the case of *Hanley v. Kleindienst*, 471 F 2d 823 (5th Cir. December 5, 1972). The court, in reviewing an agency threshold determination of the environmental significance of a jail in a neighborhood in New York City, admitted that the term was vague and subject to various interpretations. The court then set out an objective formula to determine if the proposed project would significantly affect the environment. It held that, though the agency in question is vested with broad discretion, the agency

"should normally be required to review the proposed action in light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in these affected areas. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change."

The court went on to say that though the area already might have numerous adverse environmental conditions, additional adverse conditions "may represent the straw that breaks the back of the environmental camel." Thus, the absolute effect of the project must be considered as well as the comparative effect in making a determination whether the project significantly affects the environment.

In applying the above rules and interpretations of the State Environmental Policy Act to the area and project in question, the agency must consider all the essential factors affecting the environment as set out generally in the policy statement of the Act. For example, to determine the effect the project would have on the environment and to determine whether the effect would be significant, the Capital Planning Commission should take into consideration, among other factors, the following:

- (1) The effect on the environment of the two level parking garage with particular consideration to the noise and air pollution from the planned 1,100 additional vehicular spaces in the first phase.

- (2) The effect on the environment of the increased traffic and change in traffic patterns caused by the closing of one street and therefore placing additional requirements on the remaining streets serving the number of employees needed to occupy the 16 story office building contemplated in the first phase of the

government center and the additional office buildings in subsequent phases.

(3) The effect on the environment caused by the additional fuel requirements needed for heating and air conditioning the new buildings in light of the energy crisis.

(4) The effect the new government center would have on the quality of life of the city residents in the surrounding areas and the effect such a change would have on those people.

(5) The health and safety of the public in general caused by the increased burden on the local utility systems and other public services such as sewage and garbage removal.

(6) The aesthetics of the buildings when considered in light of existing buildings in the surrounding area.

(7) The destroying of historical buildings on the National Historical Register in the area to be replaced by new buildings of little historical value.

It should be noted that the above factors also are not all inclusive but are listed solely for illustration of the factors that should be investigated to make a threshold determination. A complete list of environmental factors must be determined by the agency itself because it is in a better position than any other group to know the effect of its project on the environment. The review should include, in general, the same factors that would be studied in depth if the decision ultimately is reached to have an environmental impact statement.

A final question with regard to the threshold determination by the agency should be the mechanics of making the report of such a determination. It should be noted that the State Environmental Policy Act requires that the agencies provide the means to implement the purposes of the Act (G.S. 113A-2) and that all agencies of the State were to have by July 1, 1972, taken

"...such measures as may be necessary to bring their authority, regulations, policies, and procedures into conformity with the intent, purposes and procedures set forth in the Article." G.S. 113A-6

Therefore, all State agencies should have the administrative procedures, suited to each agency's unique requirements, to present a report of a threshold determination. However, in addition to the agency's own procedures, the following procedures should be followed, especially when a threshold determination by an agency is one that states that the program does not significantly affect the environment.

When making a determination that a project does not significantly affect the environment, the determination should be in written memorandum form. The form should include each relevant environmental factor considered by the agency, the findings made by the agency, and the reasons for making the determination. Though there is no specific statutory requirement for making a written record of the threshold determination, a written record of the findings and determinations of the agency would be beneficial as evidence supporting the agency's decision should the ultimate decision be reviewed by a court of law.

Another aspect that should be taken into consideration when making a determination should be a hearing given after due notice to the public with an opportunity for the public to present relevant facts. Although there is no specific statutory requirement for having a hearing prior to the preliminary decision, a hearing would help the agency gain information concerning the area and thus be better able to make a fair determination. Otherwise, the agency, lacking essential information, might frustrate the purposes of the Act by a threshold determination that an impact statement is unnecessary. To that end, a public hearing also will help preclude later charges that certain essential relevant factors were not considered in making a threshold determination.

Robert Morgan, Attorney General
C. Diederich Heidgerd,
Associate Attorney

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16 July 1973

Subject: Social Services; Juveniles; Courts;
Pre-hearing Detention of Delinquents and
Undisciplined Children, Compilation of
Time Limitations

Requested by: Mr. Fred K. Elkins
Chief Counsellor
District Court, Juvenile Division
Fourteenth Judicial District

Question: Does the language of G.S. 7A-286(3), as amended by the 1973 General Assembly, prohibit holding a delinquent or undisciplined child in a juvenile detention home or jail for more than five consecutive days, including Saturdays, Sundays, and legal holidays, without a hearing?

Conclusion: G.S. 7A-286(3), as amended by the 1973 General Assembly, does prohibit holding a delinquent or undisciplined child in a juvenile detention home or jail for more than five consecutive days, including Saturdays, Sundays, and legal holidays, without a hearing.

Among the multiple changes made in G.S. 7A-286 (dealing with the disposition of delinquent, undisciplined, dependent or neglected children) were new provisions relative to detention of these children prior to a hearing, when appropriate. Previously, this same section authorized the taking into custody of an alleged delinquent or undisciplined child when the court found detention of the child to be necessary for the protection of the community or in the best interest of the child. The following requirement was levied with regard to pre-hearing detention:

"No child shall be held in any juvenile detention home or jail for more than five days without a hearing under the special procedures established by this Article."

The 1973 amendment, however, changed this sentence to read:

"No child shall be held in any juvenile detention home or jail for more than five *calendar* days without a hearing *to determine the need for continued detention* under the special procedures established by this Article." (Emphasis supplied for changes in language of the statute.)

Under the prior statute, it was clear that Rule 6(a) of the Rules of Civil Procedure was controlling. As a result, intermediate Saturdays, Sundays and legal holidays were excluded in computing the five days, and, if the fifth day fell on one of these types of days, the allowable period was extended until the "next day which is not a Saturday, Sunday or a legal holiday."

Nevertheless, in common parlance, calendar days means the number of days described as "reckoned according to the course of the calendar." See *Black's Law Dictionary, Third Edition* at page 266. There is no reason to believe that the General Assembly intended this language to be interpreted in any other fashion than the norm. Quite to the contrary, this interpretation is buttressed by the new provisions included in the section under consideration to the effect that the prompt hearing is to determine "the need for continued detention" and the provisions elsewhere in the amendatory legislation providing for delegation of the court's authority to other officials when the district court is not in session. See G.S. 7A-286(3). Both of these provisions obviously were inserted in contemplation of reducing the time period during which a child might be detained prior to a hearing on the propriety of detention.

It is a basic rule of statutory construction that:

"When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." See *State Highway Commission v. Hemphill*, 269 N.C. 535, at page 539, 153 S.E.2d 22 (1967).

d: As a result, this latest specific statement of the intent of the legislators must prevail over a possibly inconsistent prior general expression of intent, and these week-end days and legal holidays must be counted in determining the duration of the five day period.

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One other aspect of this situation is worthy of comment. Inasmuch as there is no apparent conflict between the statutes regarding the manner of actually counting the five days, the portions of Rule 6(a) still govern on this subject. Thus, in actually counting the days, the day on which the child is taken into custody is not included but the last day of the period of custody is included.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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16 July 1973

Subject: Streets and Highways; Municipalities;
"Powell Bill" Funds; Expenditure for
Equipment Shed

Requested by: Mr. J. Troy Smith, Jr.
Attorney for the City of Havelock

Question: May "Powell Bill" funds be used for the
construction of an equipment shed to be
used solely for the purpose of housing
street maintenance equipment?

Conclusion: No. The portion of gasoline tax revenues
allocated to municipalities under the
provisions of G.S. 136-41.1 and known as
"Powell Bill" funds may not be used for
the construction of an equipment shed.

G.S. 136-41.3 indicates the purposes for which the "Powell Bill" funds may be expended by the municipalities. G.S. 136-41.3 provides in pertinent part:

"The funds allocated to cities and towns under the provisions of Section 136-41.2 shall be expended by cities and towns *only* for the purpose of maintaining, repairing, constructing, re-constructing or widening of any street or public thoroughfare including bridges, drainage, curb and gutter, and other necessary appurtenances within the corporate limits of the municipality or for meeting the municipality's proportionate share of assessments levied for such purposes." (Emphasis added.)

The Act limits the use of the funds to the purposes listed in the Act. The use of the funds for the construction of an equipment shed does not appear to be for the purpose of constructing or maintaining municipal streets. This Office is of the opinion that the use of "Powell Bill" funds for the construction of an equipment shed is not included within the general purpose of the Act and therefore would constitute an unauthorized expenditure of the funds.

In the case of *Teer v. Jordan*, 232 N.C. 48, the State Highway Commission issued bonds authorized under the "Secondary Road Bond Act of 1949" for the *construction or improvement* of secondary roads of the State. Bond proceeds were used to purchase equipment to be used in the construction and improvement of secondary roads. The Teer Construction Company sought to enjoin the State Highway Commission from purchasing equipment. The Supreme Court said in that case that there was no requirement that the work be let to contract and it held that the purchase of equipment to be used for highway construction was within the general purpose of the Act and that the purchase of equipment from the bond proceeds was not an unlawful diversion of public funds.

On numerous occasions since the enactment of the Act, this Office, citing as authority the case of *Teer v. Jordan, supra*, expressed the opinion that the purchase of equipment and machinery for construction and maintenance of municipal streets is within the purview of G.S. 136-41.3. However, the statute should not be unduly extended by construction to permit the use of "Powell Bill" funds for the purchase of or construction of capital improvements

not a part of the municipal streets or appurtenances thereto.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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16 July 1973

Subject: Counties; Garbage Collection and Disposal;
Article 22, Chapter 153 of the General
Statutes

Requested by: Mr. Bill Summerlin
Special Projects Officer
Union County

Question: Is a county required to charge fees
sufficient to defray the expense of garbage
collection where the statute contains
conflicting language in that it provides in
one sentence that the board of county
commissioners, in the event it shall provide
for the collection of garbage, refuse, and
solid waste, *may* charge fees for such
collection service sufficient in its opinion
to defray the expense of collection, and a
later sentence in the same statute provides
that the board *shall* charge fees sufficient
to defray the expense of collection?

Conclusion: The statute should be construed as being
mandatory and the counties are required
to charge fees sufficient to defray the
expense of collection of garbage, refuse and
solid waste.

In construing statutes, the legislative intent is the controlling criteria.
However, in Chapter 535, Session Laws of 1973, which rewrote

Article 22 of Chapter 153 of the General Statutes, the intent of the Legislature is difficult to ascertain in that the language used in two different places in the same section of the bill is clear as to language but is in direct conflict. G.S. 153-273 provides in the first paragraph that "The board may impose fees for the use of disposal facilities, and in the event it shall provide for the collection of garbage, refuse and solid waste, it *may* charge fees for such collection service sufficient in its opinion to defray the expense of collection." (Emphasis added.)

The fourth paragraph of this section provides "The board may impose fees for the use of the disposal site and if the county provides for collection services, it *shall* charge fees sufficient to defray the expense of collection." (Emphasis added.)

There is a well established and almost universal rule that in case of irreconcilable conflicting provisions in a statute, the last in point of time, or in order of position or arrangement, is held to prevail. Clearly, effect cannot be given to both of the conflicting sentences of this act and since the old act required the mandatory language of "shall", and since the order of position in G.S. 153-273 contains the mandatory language "shall", it is the view of this Office that the established rule should be applied and that the county commissioners shall charge fees sufficient to defray expense of collection.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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19 July 1973

Subject: Public Officers and Employees; Register of Deeds; County Commissioners; Authority of Register of Deeds to Employ Deputy Register of Deeds; Compensation.

Requested by: Mr. William Brunsey, III

Currituck County Attorney

Questions:

(1) Does G.S. 153-48.3(2) entitle the register of deeds of a county to a full time deputy, or does the board of commissioners have the authority to limit the deputy to part time employment, over the objection of the register of deeds, if said board deems the work load of the office is not enough to justify full time employment?

(2) If the register of deeds has the exclusive right to hire his employees, subject to the limitation set forth in G.S. 153-48.3(1), and in the exercise of that authority hires a full time deputy, who is to determine whether the compensation provided by the board of commissioners is reasonable?

(3) Does the board of county commissioners have the authority to base compensation of the deputy register of deeds entirely on the demands and work load of the office and limit the compensation accordingly?

Conclusions:

(1) G.S. 153-48.3 provides that the register of deeds shall be entitled to at least one deputy and gives the register of deeds the sole and exclusive right to hire, discharge and supervise all employees in his office. Thus we conclude that if the register of deeds deems a full time deputy necessary, the board of commissioners does not have the authority to limit the deputy to part time employment over the objection of the register of deeds.

(2) G.S. 153-48.3 provides that the deputy register of deeds shall be reasonably

compensated by the board of county commissioners. Thus we conclude that the board of county commissioners determines what is a reasonable compensation for the deputy register of deeds.

(3) Although the statute does not specify what factors a board of county commissioners shall consider in determining reasonable compensation for the deputy register of deeds, we conclude that the board of county commissioners may consider any pertinent factors relating to the job such as qualifications of the deputy register of deeds, the complexity of the work, the responsibilities of the work, the demands and work load of the office, and such other factors as the board of county commissioners would consider in the employment of similar employees.

In addition to G.S. 153-48.3, which gives the register of deeds the sole and exclusive right to hire, discharge and supervise all employees in his respective office, subject to the exceptions contained therein, G.S. 161-6 provides that the registers of deeds of the several counties are authorized to appoint one or more assistant or deputy register of deeds. This section contains the authority and duties of the assistant register of deeds. From these two statutes, it is clear that the register of deeds has the authority to employ a full time deputy or a part time deputy, as, in his discretion, he deems necessary.

G.S. 153-48.3(2), which provides that the register of deeds shall be entitled to at least one deputy to be reasonably compensated by the board of county commissioners, does not specify whether the register of deeds or the board of county commissioners determines the reasonableness of the compensation paid the deputy. G.S. 153-48.3 deals with the reduction of salaries of employees in the register of deeds' office and all reductions in such salaries except reductions which apply alike to all county offices and departments shall be subject to the approval of the register of deeds. If the register

of deeds disapproves of action of the board of county commissioners, the board shall meet with the register of deeds in an attempt to reach an agreement. If no agreement can be reached, either party may refer the dispute to the senior resident superior court judge of the district for arbitration.

Although a similar procedure may be followed as to setting the salary of the deputy register of deeds, such is not required by the statute and in the final analysis it would appear that the board of county commissioners would be the body to determine the reasonableness of the compensation in view of G.S. 159-13(a), which provides that in adopting the budget ordinance the county commissioners shall make budget appropriations and levy taxes for the budget year in such sums as the board may deem sufficient and proper whether greater or less than the sums recommended in the budget.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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19 July 1973

Subject: Criminal Law and Procedure; Motor
Vehicle Violations; Prosecution on
Uniform Traffic Ticket

Requested by: Mr. Thomas F. Moore, Jr., Solicitor
26th Solicitorial District

Question: In district court traffic matters, may the
defendant be tried on an unsworn traffic
citation, such procedure designed to
facilitate the processing of large volumes of
tickets by permitting officers to deposit
same without having first to see a
magistrate?

Conclusion: No.

Under North Carolina law a valid warrant or indictment is an essential of jurisdiction; e.g., *State v. Morgan*, 226 N.C. 414, 38 S.E.2d 166 (1946); *State v. Beasley*, 208 N.C. 318, 180 S.E. 598 (1935).

Article I, § 22 of the Constitution of North Carolina, establishing modes of criminal prosecution, has been interpreted as granting to the legislature the power to provide means of trial for misdemeanors. *State v. Stevens*, 264 N.C. 364, 141 S.E.2d 521 (1965). This power is manifested in General Statutes Chapter 15, Article 3, as pertains to arrest warrants. As herein stated, a valid warrant is an essential of jurisdiction; and G.S. 15-19 provides that such warrant shall be issued only upon examination of complainant under oath.

Where prosecution is upon the original warrant, then the complainant must swear to the warrant, or trial is a nullity for want of jurisdiction.

For opinion as to waiver of *service* of warrant upon which defendant is prosecuted, see 40 N.C.A.G. 193 (1969).

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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19 July 1973

Subject: Agriculture; Structural Pest Control
Committee; Authority to Limit Use of and
Potency of Chemicals Used in Pest Control

Requested by: Mr. Rudolph E. Howell, Secretary
Structural Pest Control Committee

Questions: (1) May the Structural Pest Control
Committee, by regulation, determine which
chemicals may be used in pest control work

by licensees under the Structural Pest Control Act?

(2) May the Structural Pest Control Committee, by regulation, set the concentrations and rates of chemicals used in pest control work by licensees under the Act?

Conclusions:

(1) Yes.

(2) Yes, provided such regulation does not conflict with the provisions of the Federal Environmental Pesticide Control Act of 1972.

Chapter 1017 of the 1955 Session Laws, codified as Article 4C of Chapter 106 of the General Statutes, created the Structural Pest Control Commission (now Committee) and authorized it to license and regulate structural pest control operators who engage in the control of wood-destroying organisms and household pests. The Committee is specifically authorized to make such rules and regulations " . . . as may be necessary to protect the interests, health and safety of the public." Obviously, the determination of which chemicals may be employed, their strength and manner of use, is connected with the health and safety of the public.

The Federal Environmental Pesticide Control Act of 1972 (Public Law 92-516) provides in Section 24(a) that "A State may regulate the sale or use of any pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act; . . . "

Other sections of the federal act provide for the registration of all pesticides, their classification for general and restricted use (or both) and their labeling. Actual use is required, however, to be "in a manner consistent with the labeling . . . " Sec. 12(a) (2)(b). In our opinion this restriction prohibits the Committee from authorizing or requiring chemicals (pesticides) to be used in greater concentration or rates than that permitted under federal registration but does not prohibit the Committee from authorizing or requiring

chemicals (pesticides) to be used in lesser concentrations or rates than permitted under federal registration.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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19 July 1973

Subject: Marriage and Divorce; Jury Trial; Waiver in Cases Where Defendant is Served by Publication

Requested by: Honorable Tom H. Matthews
District Court Judge
7th Judicial District

Question: Is a defendant in a divorce action who has been served by publication entitled to a jury trial as a matter of right even though he has not served a demand for a jury trial?

Conclusion: A defendant in a divorce action who has been served by publication is not entitled to a jury trial as a matter of right when he has not served a demand for a jury trial.

The 1973 General Assembly revised G.S. 50-10 so as to read as follows:

"§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; parties cannot testify to adultery; procedure same as ordinary civil actions.-The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in

any such complaint until such facts have been found by a judge or jury. The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39. On such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact."

This clear and simple phraseology only necessitates reference to Rule 38(d) of the Rules of Civil Procedure in order to arrive at the conclusion that, unless a jury trial cannot be waived, " . . . the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver by him of trial by jury."

Of course, there is a very real chance (if not likelihood) that the defendant served by publication may not receive any real notice. Thus, the argument may be raised that this type defendant should be treated differently from those who have been served in a manner better calculated to give them actual notice of the proceedings. This type of reasoning together with prior statutory provisions vesting additional rights to a jury trial have led to contrary opinions on this subject. See opinion of Attorney General to Honorable Lewis Bulwinkle, Chief District Judge, 27th Judicial District (40 N.C.A.G. 134); opinion to Honorable Tom H. Matthews, District Court Judge, 7th Judicial District (40 N.C.A.G. 385). However, in view of the 1973 amendment to G.S. 50-10, there does not appear to be any prohibition - - constitutional or statutory - - to the "waiver" of a jury under these circumstances. Compare opinion of Attorney General to Honorable John S. Gardner, District Court Judge, 16th Judicial District (41 N.C.A.G. 473). Quite to the contrary, it would appear that where service in accordance with Rule 4(j)(9)c amounts to the best notice which may be obtained consistent with reasonable diligence, there is no valid reason for not following the clear provisions of the current statute.

It is noted that the Rules of Civil Procedure do provide the court with additional authority for safeguarding the rights of a defendant served by publication (or otherwise). Thus, if it appears that a jury trial would be desirable or appropriate, Rule 39(b) vests the court

with the authority, in its own discretion, to order a trial by jury upon any or all issues involved in the divorce action.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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25 July 1973

Subject: Rural Fire Protection Districts; Elections;
Members of Fire District Commission
Appointed Rather than Elected;
Referendum for Creation of Fire District
and Levy of Tax Held by County Board

Requested by: Mr. John R. Boger, Jr.
Cabarrus County Attorney

Question: Does G.S. 163-284.1 require the members
of the fire protection district commission
to be elected and such election to be
conducted by the county board of
elections?

Conclusion: No.

G.S. 69-25.7 provides that the special fund to provide fire protection, as provided in Article 3A of Chapter 69 of the General Statutes, shall be administered by the Board of County Commissioners or the joint boards of county commissioners if the areas lie in more than one county or by a fire protection district commission of three qualified voters of the area. The fire protection district commission members are appointed by the board of county commissioners for a term of two years to serve at the discretion and under the supervision of the board of county commissioners. There is no statute which requires that the members of the fire protection district commission be elected. G.S. 163-284.1 requires all elections held for a fire district to be conducted by the county

board of elections. However, the only election held in a fire district is that provided for under G.S. 69-25.1, pursuant to a petition for the creation of the fire district and for the levying of the tax to provide fire protection. Therefore, where the referendum is held for this purpose, the county board of elections would hold the referendum for the purpose of creating the fire district and the levying of the tax but no election is required for members of the fire protection commission.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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25 July 1973

Subject: Taxation; Ad Valorem; Situs for Listing
Cars Used by Officers and Employees of
Corporations; G.S. 105-340(h)(2)

Requested by: Mr. D. R. Holbrook, Director
Ad Valorem Tax Division
N. C. Department of Revenue

Question: Where is the property tax situs of company
cars customarily parked overnight at the
private residences of company officers and
employees?

Conclusion: Generally, the taxable situs of company
cars is at the company's principal place of
business.

The question of the proper place for the ad valorem listing of company cars, when those cars are normally used and kept at locations other than the company's business premises, has been a recurring problem and one which has been presented in varying forms from at least as early as February, 1954. At that time, we advised the Martin County Tax Collector that in the situation of

a Martin County company employing salesmen outside Martin County and where such salesmen use company automobiles and "personally arrange for the parking or storage of the automobiles outside the County, such automobile should be listed for taxation in the County where the salesmen reside and usually store such automobiles." That opinion did not address itself to the question of whether automobiles routinely kept overnight by employees *at their personal residences* are taxable there, but was merely interpreting the then applicable Machinery Act which provided for taxation when an owner or agent *hires or occupies a place for storage for use in connection with such property.*

We note, however, that in August and October, 1959, and in February, 1962 and April 1964, we advised certain attorneys and tax collectors that where companies located outside the city limits customarily allow their company vehicles to be kept overnight at the in-city homes of their employees, the cars in question then become subject to city ad valorem taxation. Finally, on December 10, 1971, we advised Mr. Robert Black, Iredell County Tax Supervisor, that company cars driven by its employees and normally kept overnight at the employees' personal residences are subject to ad valorem taxation at the employees' residences.

Those opinions dating from August 1959 through December 1971, written under a previous Machinery Act are withdrawn. The opinion of December 10, 1971, where in conflict with this opinion, is also withdrawn.

G.S. 105-304 provides that, generally, the ad valorem situs of tangible personal property is at the residence of its owner, while the residence of a corporation is at its principal place of business. G.S. 105-304(f)(2), however, provides an exception to this general rule whereby:

"Tangible personal property situated at or commonly used in connection with a business premises hired, occupied, or used by the owner of the personal property (or by the owner's agent or employee) shall be taxable at the place at which the business premises is situated "

"Business premises" is defined by G.S. 105-304(b)(2) as follows:

"'Business premises' includes, for purposes of illustration, but is not limited to the following: Store, mill, dockyard, piling ground, shop, office, mine, farm, factory, warehouse, rental real estate, place for the sale of property (including the premises of a consignee), and place for storage (including a public warehouse)."

We feel it manifest from the "business premises" exception of G.S. 105-304(f)(2) that it does not apply to factual situations involving the parking of company cars by its employees at their individual private residences. An examination of those "premises" qualifying as "business", convince us that they are in some way proximately connected with the income producing activities of the company and are hired, acquired, or under some type of control by the company itself. The private homes of company employees used merely as overnight parking places, do not meet these characterizations. Consequently, it is our opinion that vehicles so maintained remain taxable at the company's principal place of business.

Robert Morgan, Attorney General
George W. Boylan,
Associate Attorney

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31 July 1973

Subject: Social Services; Executive Organization Act of 1973; Authority of Secretary of Human Resources to Assign Licensing Authority for Boarding Homes, Rest Homes and Convalescent Homes for Aged and Infirm Persons

Requested by: Mr. David T. Flaherty
Secretary
N. C. Department of Human Resources

Questions:

(1) Is the Secretary of Human Resources required to delegate to county directors of social services the work required in the licensing of boarding homes, rest homes and convalescent homes for aged and infirm persons?

(2) May the Secretary of Human Resources administratively assign to the Division of Medical Facilities Services and Licensure the functions and duties involved in licensing boarding homes, rest homes and convalescent homes for aged and infirm persons?

Conclusions:

(1) The Secretary of Human Resources is not required to delegate to county directors of social services the work required in the licensing of boarding homes, rest homes and convalescent homes for aged and infirm persons.

(2) The Secretary of Human Resources may administratively assign to the Division of Medical Facilities Services and Licensure the functions and duties involved in licensing boarding homes, rest homes and convalescent homes for aged and infirm persons.

Among the duties and responsibilities levied upon a county director of social services by G.S. 108-19 are the following:

"(5) To act as agent of the Social Services Commission in relation to work required by the Social Services Commission.

.

"(10) To supervise boarding homes, rest homes and convalescent homes for aged or infirm persons, under

the rules and regulations of the Social Services Commission."

Addressing the authority of the Social Services Commission, Section 134(c)(2) of the Organization Act of 1973 gives the Commission the power and duty to establish and adopt standards "for the inspection and licensing of all boarding homes, rest homes, and convalescent homes for aged or infirm persons as provided by G.S. 108-77." Next, G.S. 108-77, after amendment by the Organization Act of 1973, provides that, with certain exceptions not pertinent here, the Department of Human Resources " . . . shall inspect and license, under the rules and regulations adopted by the Social Services Commission, all boarding homes, rest homes, and convalescent homes for persons who are aged or who are mentally or physically infirm . . . "

Finally, the Organization Act of 1973 requires the head of a principal department to provide all administrative services and management functions required by any commission assigned to it. See Section 14 of the Organization Act. Additionally, Section 10 of the Act provides that the head of a principal State department may assign or reassign any function vested in him or in his Department to any subordinate officer or employee of his Department.

Recognizing the language of all of these legislative provisions and presuming, as we must, that the legislators intended that they be consistent with each other, several things become immediately apparent. The Department of Human Resources is required to inspect and license the facilities described under rules and regulations adopted by the Social Services Commission and using standards adopted by it. This inspection and licensing comes within the management functions - - defined as including "planning, organizing, staffing, directing, co-ordinating, reporting, and budgeting" - - levied upon the Department of Human Resources by the Organization Act of 1973. The county director of social services may be called upon to act as agent for the Social Services Commission, but it is not mandated that his services *must* be utilized as an agent for all purposes. Similarly, the county director may be required to supervise these facilities, but it is not *statutorily required* that he perform the inspection and licensing functions.

In view of the flat, unequivocal requirement that the Department of Human Resources "shall inspect and license" these facilities, and the mandate that the Department assume the management and administrative functions for the Commission, the only logical conclusion must be that the Secretary of Human Resources may directly assume these responsibilities and duties and may then assign them to its subordinate, the Division of Medical Facilities Services and Licensure. These functions, of course, must be accomplished so as to assure compliance with the over-all rules and regulations and achievement of the standards established by the Social Services Commission. Any policy conflict on this score should be resolved by personal decision of the Governor in accordance with Section 4 of the Executive Organization Act of 1973.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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31 July 1973

Subject: Infants and Incompetents; Juveniles;
Authority of Police to Detain to Restore
Custody to Parent

Requested by: Mr. W. W. Moore
Chief of Police
Atlantic Beach

Question: What authority is required for a police
officer to detain 16 and 17 year old
runaway juveniles until they may be
restored to the custody of their parents?

Conclusion: A court order must have been issued
pursuant to G.S. 7A-284, G.S. 110-44.4
or G.S. 110-58 before a police officer or
other appropriate person may take into

custody and detain a runaway juvenile for the purpose of restoring the juvenile to the custody of his parents.

Article 23 of Chapter 7A, Article 2A of Chapter 110 and Article 5 of Chapter 110 of the General Statutes provide explicit procedures by which a parent may regain physical custody of the runaway juvenile. A petition or verified complaint, as the case may be, must be filed with the court by the parent, guardian or person standing *in loco parentis*. After the procedures are complied with and the findings are made as set forth in the particular statute, the court may issue an order for the runaway juvenile to be taken into custody and detained. G.S. 110-44.4 provides that the juvenile shall be taken before the court; G.S. 7A-284 provides that the juvenile shall be taken to such place or person as designated in the order; and G.S. 110-64, which is a part of the Interstate Compact on Juveniles, provides that the period of time for holding a runaway juvenile shall not exceed 30 days.

It is the opinion of this Office that the legislature, in creating these statutory procedures to obtain the return of runaway juveniles and cognizant of the due process and other constitutional rights of these juveniles, intended that these statutory procedures be complied with whenever the State intervenes to assist a parent in re-establishing control over his runaway child.

It may be noted that Session Laws of 1973, Chapter 269, amends G.S. 7A-281 to provide that a police officer may obtain the petition, under certain circumstances, at the direction of which a court may later issue an order authorizing the police officer to take into custody and detain the runaway juvenile. In some situations involving diverse geographic locations this provision may serve as a method of effecting more expeditious custody of a runaway juvenile when time is of the essence.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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31 July 1973

Subject: Statutes; Construction of, Weapons

Requested by: Mr. R. D. McMillan, Jr.
State Purchasing Officer

Question: Are the provisions of G.S. 20-187.2(a), which provide that the service revolver of a deceased or retired law enforcement personnel shall go to the surviving widow or the retiring person, repealed by the provisions of Chapter 666 of the 1973 Session Laws which prohibit the disposal of pistols except to governmental law enforcement agencies needed in law enforcement?

Conclusion: No. The provisions referred to which permit the retention of the service revolver by the member retiring and to be given to the widow of a deceased law enforcement officer killed in the line of duty are not in conflict with Chapter 666 of the 1973 Session Laws.

Chapter 669 of the 1971 Session Laws, codified as G.S. 20-187.2(a), provides that the surviving widow of a State law enforcement officer killed in the line of duty or a member of the law enforcement agency retiring shall receive upon request at no cost the service revolver worn or carried by the deceased or retiring member upon securing a permit. Chapter 666 of the 1973 Session Laws provides that "Except as hereinafter provided, it shall be unlawful for any employee, officer or official of the State in the exercise of his official duty to sell or otherwise dispose of any pistol, . . . to any person, firm, corporation, county or local governmental unit, law enforcement agency or other legal entity." Section 2 of the bill provides that it shall be lawful for the Purchase and Contract Division to sell any weapon described in Section 1 to a law enforcement agency in the State upon receipt of a notarized statement certifying that the weapon is needed in law enforcement

by such law enforcement agency. Section 3 provides that all weapons described in Section 1 hereof which are not sold as herein provided *within one year of being declared surplus property* shall be destroyed by the Purchase and Contract Division of the Department of Administration. The bill was made effective forty-five days after ratification on May 22, 1973.

In the interpretation of statutes, the legislative intent constitutes the law. In seeking the legislative intent, a construction which will operate to defeat or impair the object of the statute should be avoided if the Court can reasonably do so without violence to the legislative language. *State v. Miller*, 282 N.C. 633, 640.

Although Section 1 of the Act indicates that it is illegal for any official of the State to sell or otherwise dispose of any weapons, Section 3 indicates that the weapons referred to in Section 1 are those which have been declared *surplus property*. Section 3 provides that all weapons described in Section 1 hereof which are not sold as herein provided *within one year of being declared surplus property* will be destroyed. The title of the Act may be resorted to as an aid to the interpretation of the Act. *Smith v. Davis*, 228 N.C. 172; 50 Am. Jur. Statutes 311. The caption of Chapter 666 is entitled "An Act to Restrict the Sale of *Surplus* Weapons by the State of North Carolina". The revolvers referred to in G.S. 20-187.2(a) are not revolvers which have been *declared surplus* and for this reason it does not appear that the provisions of Subsection (a) of G.S. 20-187.2 are in conflict with Chapter 666.

Chapter 666 of the 1973 Session Laws does not contain any repealing clause nor does it refer to any specific statute. As a general rule, general statutory provisions do not control, modify, limit, affect or interfere with special or specific provisions. The special or specific provisions are often referred to as an exception to the general or broad rule. 50 Am. Jur. Statutes par. 561; *Greensboro v. Guilford County*, 191 N.C. 584. The specific subject of gifts of service revolvers to widows and retiring personnel should be viewed as an exception of the general rule provided in Chapter 666. This Office is of the opinion that G.S. 20-187.2(a) is not in irreconcilable conflict with Chapter 666 of the 1973 Session Laws and that there was no legislative intent to repeal G.S. 20-187.2(a). No opinion is expressed herein as to G.S. 20-187.2(b).

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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31 July 1973

Subject: Mental Health; Involuntary Commitment;
Designation of a Veterans Administration
Hospital as the Place of Commitment

Requested by: Honorable Hal H. Walker
Chief District Judge
19th Judicial District

Question: Under the provisions of Article 5A,
Chapter 122, North Carolina General
Statutes, effective September 1, 1973, may
an eligible veteran be involuntarily
committed by a North Carolina court to
a Veterans Administration Hospital within
North Carolina?

Conclusion: Under the provisions of Article 5A,
Chapter 122, North Carolina General
Statutes, effective September 1, 1973, an
eligible veteran may be involuntarily
committed by a North Carolina court to
a Veterans Administration Hospital within
North Carolina.

G.S. 34-16 contains the following pertinent provisions authorizing
commitment to a Veterans Administration Hospital pursuant to
commitment procedures under the laws of North Carolina:

"§ 34-16. *Commitment to Veterans Administration,
etc., for care or treatment.*-(a) Whenever, in any
proceeding under the laws of this State for the
commitment of a person alleged to be of unsound

mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this State; and nothing in this section shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this State shall be subject to the rules and regulations of the Veterans Administration or other agency. The chief officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall, with respect to such person, be vested with the same powers as superintendents of State hospitals for mental diseases within this State with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this State at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this section are so conditioned."

The present question has arisen because of the language contained in Article 5A, Chapter 122, of the General Statutes, as rewritten by the 1973 General Assembly. This new Article (effective September 1, 1973) provides for the judicial commitment of a

person who "by reason of the commission of overt acts, is determined . . . to be violent and of imminent danger to himself or others, or to be gravely disabled . . . " . Additionally, the rewritten statute defines the "treatment facility" to which these types of persons may be committed to include only those hospitals, institutions, centers or facilities operated by the State of North Carolina designed to handle these types of patients and community mental health clinics or centers administered by the State of North Carolina.

Turning first to the matter of the new terminology describing the types of patients who may be committed, it would appear that there is no conflict between the statutes. The court will be limited to committing individuals as described in Article 5A and certainly those persons will fall within the category of one who is in need of confinement in a hospital or other institution for necessary safekeeping and treatment.

As to the other facet of the problem, G.S. 34-16 specifically vests the chief officer of a Veterans Administration facility with the same powers as the heads of similar State facilities and requires that the State court shall retain jurisdiction over the personnel committed to the Veterans Administration Hospital. Additionally, it appears that it has been informally ascertained that it is the policy of the Veterans Administration that commitment of non-active duty patients to federal mental hospitals is governed by the laws of the State in which the hospital is located.

Therefore, judicial commitment of an eligible veteran to a veterans hospital would appear to equate to commitment to a facility operated by the State, and, where the other requirements are met, such would appear to be authorized.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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31 July 1973

Subject: Motor Vehicles; Municipal Regulation;
Noise Ordinances

Requested by: Mr. Bruce Turney, City Manager
Graham

Question: May a municipal corporation enact
anti-noise ordinances directed toward
motor vehicles without conflicting with
State motor vehicle laws?

Conclusion: Yes.

Generally, a municipal corporation has the power to legislate with respect to a particular area of concern upon express delegation of power from the State. G.S. 160A-184 (1971) expressly empowers municipalities to regulate, restrict or prohibit the emission of loud noises or other sounds tending to annoy, disturb or frighten citizens. Standing alone, and upon its clear meaning, the statute enables the municipalities to enact otherwise proper anti-noise ordinances which would be applicable to motor vehicles.

A problem arises in reconciling any such anti-noise ordinance with existing State law on the matter. Generally, a local governmental unit may not legislate where (1) the result would be inconsistent with State law, or (2) the State has pre-empted the field the local unit purports to regulate.

With respect to the matter of inconsistency, G.S. 20-128, providing that mufflers be in good working order so as to prevent excessive or unusual noise, represents the sole legislative effort toward regulation of motor vehicle noise. The statute is properly taken as a general policy statement against certain excessive motor vehicle noise. A properly constructed local ordinance establishing reasonable and specific permissible noise levels would likely be found valid as consistent with G.S. 20-128.

The recent case of *State v. Williams*, 283 N.C. 550 (1973), sets forth a clear standard for determining whether the State has

pre-empted local governmental units' authority to act in the various areas of combined State and local concern. The Court there indicated that when an ordinance purports to regulate a field for which a statute *clearly* shows legislative intent to provide a complete and integrated regulatory scheme directed toward a particular area of concern, the various local governmental units are precluded from entering this area.

The muffler statute appears within Article 3, Part 9 of the Motor Vehicle Laws, pertaining generally to equipment standards, which article is prefaced by G.S. 20-115, an introductory statute which could be interpreted as a legislative expression of pre-emption. However, the somewhat ambiguous statute is properly construed as pre-emptive only of the area of motor vehicle equipment for the following reasons: (1) there is no *clear* manifestation of legislative intent to pre-empt (in matters other than vehicular size, weight and equipment regulation); (2) Article 3, Part 9 considerably predates G.S. 160A-184; and the Legislature may be presumed to have had knowledge of the content of Article 3, Part 9; therefore, its intention in enacting G.S. 160A-184 was to open the area to municipalities, and have reconciled any inconsistencies between the two statutes.

In regard to reconciling any inconsistencies arising upon application of the two statutes, a proper approach would recognize that N.C.G.S. Ch. 20, Article 3, Part 9 relates mainly to motor vehicle *equipment*, while G.S. 160A-184 deals with noise levels. A valid municipal anti-noise ordinance should be directed towards establishing technically sound and reasonable noise level requirements, whose enforcement would be consistent with the municipality's exercise of the police power for the health and well-being of its citizens.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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3 August 1973

Subject: Taxation; Ad Valorem; Farm Land;

Interest Upon Deferred Taxes;
G.S. 105-277.2, *et seq.*

Requested by: Honorable B. D. Schwartz
North Carolina House of Representatives

Question: Where property classified for purposes of ad valorem taxation as farm land under G.S. 105-277.2, *et seq.*, is disposed of or is subject to reclassification, is interest due upon taxes which were deferred because of the classification of the land for agricultural purposes; and if so, does it accrue from the time the deferred taxes would have been payable in the absence of classification pursuant to the statute?

Conclusion: Yes; interest is due on deferred taxes from the time the deferred taxes would have been payable in the absence of classification pursuant to statute.

Chapter 709 of the 1973 Session Laws permits the appraisal and assessment of agricultural lands, within carefully circumscribed limits, at their present use value as agricultural land rather than at their true value in money, based upon highest and best use. However, the statute goes on to provide that "The difference between the taxes due on the present use basis and the taxes which would have been payable in the absence of this classification shall be a lien on all the real property of the taxpayer as provided in G.S. 105-355(a), shall be carried forward in the records of the taxing unit or units as deferred taxes, but shall not be payable, unless and until the owner disposes of the property or the property loses its eligibility for the benefit of this classification for some other reason."

Inquiry has been made whether the Legislature intended interest to be paid on such deferred taxes from the time they would otherwise have been due, had they not been deferred. The answer, in our opinion, is "Yes".

G.S. 105-277.4(c) expressly provides that "taxes for the preceding five fiscal years which have been deferred as provided herein, shall immediately be payable, together with interest thereon as provided in G.S. 105-360 for unpaid taxes *which shall accrue on the deferred taxes due herein as if they had been payable on the dates on which they originally became due.*" (Emphasis added.) Since the statute embodies the concept of *deferred* taxes and waives liability only for such taxes as shall have accrued before the five years prior to the disposal or reclassification, it is clear that the Legislature intended a tax liability based upon fair market value to arise each year the property is assessed. But for the statutory classification, the liability would not only have been due but payable as well. And since G.S. 105-277.4(c) provides that interest accrues on the deferred taxes as if the taxes had been payable on the dates they *originally* became due, it is clear that interest on the deferred taxes payable upon disposition or reclassification accrues from the dates within the previous five years upon which the ad valorem tax liability for each of those five years originally arose and would have become due and payable in full in the absence of the classification.

The rationale for such treatment is, we believe, easy to discern. The Legislature, in its wisdom, has recognized the plight of the farmer whose land, through no act on his part, is so situated that its highest and best use has changed from agricultural to residential or industrial, with a commensurate increase in value. However, he has no wish to develop it, or sell it for development - - only to continue its use for agricultural production. Heretofore, he has had only the alternatives of having his modest income further reduced by increased taxes, or otherwise converting it to some nonagricultural use more productive of income and thus better able to bear the tax burden. Now he has an additional alternative. Regardless of its fair market value, he can postpone payment of taxes on the difference in value between highest and actual use so long as the actual use continues, and for taxes postponed more than five years have them forgiven all together.

However, the Legislature has said, when he chooses to reap the economic benefit of its full market value, either by putting it to a use potentially more productive of income or by selling it, he will be treated (retrospectively for five years) like anyone else who might have acquired the land. And, like anyone else, he must pay

taxes due and unpaid, and interest as well on such unpaid taxes from the time they first became a lien on the property. We believe this to be the clear intent of Chapter 709.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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14 August 1973

Subject: Social Services; Adoptions; Appointment
of Next Friend For Child in Lieu of
Abandoning Parent

Requested by: Dr. Renee Westcott
Director
Department of Human Resources
Division of Social Services

Question: When one natural parent gives consent to
adoption of a child and the other natural
parent has abandoned the child, does
G.S. 48-9(a)(2) require appointment of a
next friend of the child to give or withhold
consent for the adoption?

Conclusion: When one natural parent gives consent to
adoption of a child and the other natural
parent has abandoned the child,
G.S. 48-9(a)(2) requires appointment of a
next friend of the child to give or withhold
consent for the adoption.

G.S. 48-7(a) levies the following requirements for consent of parents
for adoption of their child:

"(a) Except as provided in G.S. 48-5, G.S. 48-6 or
G.S. 7A-288, and if they are living and have not

released all rights to the child and consented generally to adoption as provided in G.S. 48-9, the parents or surviving parent or guardian of the person of the child must be a party or parties of record to the proceeding and must give written consent to adoption, which must be filed with the petition."

Looking next at G.S. 48-9(a)(2), we find the following description of situations wherein written consent by a person other than the parents will suffice:

"(2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent "

Initially, the situation described in the question posed falls outside the ambit of G.S. 48-5, G.S. 48-6 and G.S. 7A-288. Additionally, there is no statutory language indicating that the term "surviving parent" as used in G.S. 48-7(a) is to be interpreted any differently than in the normal fashion, i.e., the parent "remaining alive". See *Black's Law Dictionary, Third Edition*, page 1690.

As a result, the rule governing disposition of this situation is enunciated by the provisions of G.S. 48-9(a)(2) to the effect that when a child has been abandoned by *one or both parents*, the court shall appoint some suitable person or the county director of social services to act as next friend of the child. Of course, this requirement does not obviate the necessity of securing consent from the non-abandoning parents.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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14 August 1973

Subject: Counties; Commissioners; Authority to
Appropriate Funds to Union County
Council on Aging

Requested by: Mr. C. Frank Griffin
Attorney at Law

Question: May a board of county commissioners
appropriate either tax or non-tax funds to
a nonprofit corporation organized for the
purpose of assisting the aged?

Conclusion: A county, acting through its board of
commissioners, may not appropriate funds
directly to a nonprofit corporation.
However, a county may by contract utilize
the services of such corporation in carrying
out its duties of assisting the poor, needy,
and aged, provided such contract specifies
the matters and things to be done by the
corporation, that all county funds be used
for such purposes, that a report be made
to the county, and that an accounting be
made for all county funds involved.
Available non-tax or tax funds within
statutory and constitutional limitations
may be used for these purposes.

G.S. 153-9(23) authorizes and empowers the county commissioners to provide by tax for the maintenance, comfort and well-ordering of the poor. Under similar language G.S. 153-152 authorizes the commissioners to provide for the maintenance of the poor and to do everything expedient for their comfort and well-ordering. Under this statute specific authority is given to contract with public and private hospitals or institutions for the medical treatment and hospitalization of the sick and afflicted poor and the full faith and credit of the county is pledged for the payment of amounts due under the contract. This section provides in part:

"The contracts provided for in this paragraph and the appropriations and taxes therefor are hereby declared to be for necessary expenses and for a special purpose within the meaning of the Constitution of North Carolina and for which the special approval of the General Assembly is hereby given, and shall be valid and binding without a vote of the majority of the qualified voters of the county and are expressly exempted and excepted from any limitation, condition or restriction prescribed by the County Fiscal Control Act and acts amendatory thereof: "

While the general authorities except counties from the rule that prohibits them from becoming stockholders in corporations when the corporation is for purely charitable purposes, see 20 CJS, Counties, sec. 243, pp 1126-1128, the rule is different in North Carolina.

A municipality may not make an absolute gift of tax funds without signifying how they are to be spent, without reserving the right to direct or control their use, *Horner v. Chamber of Commerce*, 235 N.C. 77(1952), or without an accounting as to how such funds are used. *Dennis v. Raleigh*, 253 N.C. 400 (1960). While these cases deal with municipal funds, their rationale is equally applicable to the counties.

Problems associated with aging seem to be more common among the poor and needy. The General Assembly not only intended but authorized the counties to make proper provisions for the poor and needy. The manner in which these duties are accomplished is largely within the discretion of the board of commissioners.

It is the opinion of this Office that the county, acting through its board of commissioners, may not donate or otherwise appropriate either tax or non-tax funds to a nonprofit corporation. A county, however, may enter into a contract with a nonprofit corporation to provide for its services to the county in carrying out its duties of assisting the poor, needy, and aged. In such instances the contract must specify those matters and things to be done by the corporation, that funds of the county are to be used only for such purposes, that a report be made to the county, and that all county funds

be accounted for.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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14 August 1973

Subject: Jails; Medical Treatment of Prisoners;
Reimbursement of County for Medical
Expenses.

Requested by: Mr. Robert C. Hunter
McDowell County Attorney

Question: If it becomes necessary for a prisoner in
a county jail to receive medical treatment
or hospitalization, may the county which
paid those bills request of the court
through the solicitor that the court require
the prisoner to reimburse the county for
those expenses as a part of his sentence or
as one of the conditions of a suspended
sentence?

Conclusion: If it becomes necessary for a prisoner in
a county jail to receive medical treatment
or hospitalization during the period of his
confinement, the county operating the jail
is legally obligated to pay the medical or
hospital bill and the court may not, as a
part of the prisoner's sentence or as a part
of the conditions of a suspended sentence,
require the prisoner to pay such medical
or hospital bill.

G.S. 153-52(a) requires the Commissioner of Public Welfare to

develop and publish minimum standards for the operation of local confinement facilities. On January 1, 1969 these minimum standards became effective with the force and effect of law.

G.S. 153-52(b) provides that these minimum standards should be developed "with a view to providing secure custody of prisoners, and to protecting their health, comfort, and welfare." The standards have ten enumerated items including "(7) Medical care for prisoners" and "(10) Such other provisions as may be necessary for the safekeeping, privacy, care, protection, and welfare of prisoners."

G.S. 153-53.2(b) provides that in the case of a medical emergency the jail supervisory personnel will obtain " . . . emergency medical care from a licensed physician according to the plan for medical care provided by the governing body under G.S. 153-53.3. If the physician designated by the medical plan of the governing body is not available, such personnel shall secure medical services through any licensed physician who is available. The cost of such medical services shall be paid by the unit of local government operating the local confinement facility."

G.S. 153-53.3(a) states that the governing body of any local confinement facility " . . . shall include provisions for the services of a licensed physician specifically responsible for the medical services for prisoners required by law under G.S. 130-97 and G.S. 130-121 and shall include compensation by the governing body for such services."

G.S. 130-97 provides for examination for venereal diseases of prisoners within 48 hours after confinement and the isolation and treatment at public expense of prisoners, including those whose term of confinement has expired until the disease is no longer communicable.

G.S. 130-121 provides for a thorough physical examination by the county or city physician, or local health director, or other responsible physician of all prisoners within 48 hours after confinement.

G.S. 7A-304 provides that certain criminal costs of a trial may be taxed to the defendant. It further provides that those costs set forth

in the "section are *complete and exclusive, and in lieu of any and all other costs and fees*, except that witness fees, *jail fees* and cost of necessary trial transcripts shall be assessed as provided by law in addition thereto." (Emphasis supplied.) G.S. 7A-313 provides that the uniform jail fees shall be three dollars (\$3.00) for each day's confinement or fraction thereof.

G.S. 153-181 which provided that prisoners committed for any criminal offense or misdemeanor would bear all reasonable charges for their support until released and making the estate of all such persons liable for the payment of such charges was repealed by Session Laws 1973, C. 57, Sec. 5.

G.S. 153-53.3 specifically states that the governing body of a local confinement facility will provide for the payment of medical and hospital expenses of prisoners confined in that facility. Further, G.S. 7A-304 provides, in part, that the costs enumerated as being chargeable to the defendant in a criminal action are "complete and exclusive, and in lieu of any and all other cost and fees, except that witness fees, jail fees . . . shall be assessed as provided by law . . . ". G.S. 153-181, which had previously provided that prisoners pay costs of their confinement, was rescinded by Session Laws 1973, C. 57, Sec. 5. Therefore, there is no statutory provision that a prisoner be required to pay for hospital or medical expenses incurred while he is being confined as a prisoner in a local confinement facility.

Thus, the cost of medical treatment of prisoners has been imposed by statute upon the county or municipality operating a confinement facility, and the court may not require the prisoner to pay such costs.

Robert Morgan, Attorney General
John R. B. Matthis,
Assistant Attorney General

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22 August 1973

Subject: Taxation; Intangibles Tax; Accounts Receivable; Accounts Payable; Rent; G.S. 105-201

Requested by: Mr. A. R. Waters, Jr., Director
Intangibles Tax Division
Department of Revenue

Question: Is accrued rent subject to intangibles tax as an account receivable?

Conclusion: Yes.

It has long been the policy of the Department of Revenue to treat accrued rent as a receivable, taxable to the lessor under G.S. 105-201, and deductible by the lessee from his accounts receivable under the same statute. However, the question of the propriety of this treatment has risen again, after being dormant for almost twenty years, based upon the following note appearing in a certain tax service:

"Accrued rent is not taxable to lessor as an account receivable in year it accrues; neither is it deductible as an account payable to lessee. OAG 7-16-54, reverses OAG 6-17-53."

A considerably different analysis appears in another service:

"Rent payable in January, which is the difference between a minimum already paid and the actual rate based on annual gross sales, is not an account receivable by December 31."

In view of the apparent misunderstanding of the above-referenced opinions by one service, and by taxpayers in consequence thereof, a careful examination of them is in order.

Each dealt with the identical factual situation: Real property owned by an estate was leased to a department store under a ten year

lease. Under the terms of the lease, rent was measured by a certain percentage of sales. However, the lessee paid a minimum monthly rent of \$2500 on the 14th of each month. Any difference between the total monthly payments made each year and the annual rental determined on a gross sales basis was paid annually *at the end of the rent year on January 14th*. The department store sought to deduct the difference so determined from its receivables as an account payable as of 31 December, the day on which its intangibles tax liability arose.

In the opinion dated 17 June 1953, it was stated: "There is no contention that the rent under consideration in the instant case has not accrued, and accrued rent is personal property. In the instant case, it was possible to determine absolutely as of December 31st that the amount in question was payable. The fact that such amount was not to become due until January 14th would not affect this."

In the opinion of 16 July 1954, the opposite conclusion (that the rent had *not* accrued) was reached: "While it is true that in proper accounting, the lessee should, as of December 31st, reflect its status with respect to rent liability, nevertheless the status of such as of December 31st does not constitute an account payable within the meaning of the Revenue Act . . . the status of the rent under a contract such as is described above does not, on December 31st, constitute an account receivable so far as the lessor is concerned nor an account payable so far as the lessee is concerned."

Both opinions are in accord so far as the governing legal principle is concerned: if rent has accrued on or before the taxable date and is unpaid on that date, it is a receivable to the lessor and a payable to the lessee. If it accrues after that date, it is neither to either.

Where the opinions are in conflict is in the determination of whether, on the facts stated, the rent had accrued on the visitation date.

Rent is generally held to have "accrued" on the day it is due. *Albertha Corporation v. Preiss*, 69 R.I. 169, 32 A2d 155; *New Order Building and Loan Assn. v. 222 Chancellor Ave.*, 106 N.J.Eq. 1, 149 A. 525; *In re Pincus Clothing Co.*, (D.C.Ala.) 5 F. Supp. 365; *Prudential Insurance Co. of America v. Buss*, 240 Iowa 701, 37 NW 2d 300.

The annual rental period ended on 14 January and the percentage rent was due to be paid on that date. The visitation date was on the preceding 31 December. There is little doubt that the latter opinion was correct in holding that the rent *had not accrued* on 31 December and was not subject to the provisions of G.S. 105-201.

However, if the rent had been due on 14 December and had remained unpaid on 31 December, then the provisions of the statute would have applied.

Thus, it remains our opinion that *accrued* rent, which remains unpaid on the taxable date, is an account receivable to the lessor and an account payable to the lessee, and therefore subject to the provisions of G.S. 105-201; *unaccrued* rent is neither, and therefore not subject to G.S. 105-201.

We are further of the opinion that the first-quoted tax service might more accurately have stated that "*unaccrued* rent is not taxable to lessor as an account receivable . . . etc."

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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22 August 1973

Subject: Public Officers and Employees; Double
Office Holding; County Commissioner
Serving as Trustee of Technical Institute
and as Ex Officio Member of Mental Health
Board.

Requested by: Mr. F. L. Carr,
Wilson County Attorney

Question: May a person who holds the position of
county commissioner and the position of

trustee of a technical institute also serve as a member of an area mental health board in an ex officio capacity?

Conclusion: Yes.

Article VI, Section 9 of the North Carolina Constitution permits one person to hold one elective office in State and local government and to hold one appointive office in State or local government concurrently as authorized by the General Assembly.

G.S. 128-1.1 authorizes a person to hold an elective office in State or local government and to hold concurrently therewith one other appointive office in either State or local government.

Under the facts presented, the county commissioner, which is an elective position, also serves as a member of the board of trustees of Wilson County Technical Institute, which is an appointive office, and also as a member of an area mental health board. G.S. 122-35.20 provides that an area mental health board shall consist of 15 members. In areas consisting of only one county, the board of county commissioners shall appoint all of the members of the area mental health board. In areas consisting of more than one county, each board of county commissioners within the area shall appoint one commissioner as a member of the area mental health board. This statute provides that at least one commissioner from each county shall be a member of the area mental health board and further provides that any member of an area mental health board, who is a public official, shall be deemed to be serving on the board in an ex officio capacity to his public office. The ex officio members shall serve until the end of their respective terms as public officials.

Thus it is clear that a county commissioner who is appointed to the area mental health board serves in that capacity by virtue of being a county commissioner and the General Assembly has merely imposed upon the office of county commissioner the additional duties of a member of the area mental health board.

In the case of *McCullers v. Commissioners*, 158 N.C. 75, our Supreme Court construed Article XIV, Section 7 of our previous

Constitution which prohibited dual office holding, and stated that it is not a case where one person holds two offices at the same time, but rather the case where the duties of a member of the county board of health are to be performed ex officio by the chairman of the board of commissioners, the mayor, and the superintendent of the schools. The Court stated that such a statute as G.S. 122-35.22 in substance simply annexes additional duties and powers to the other public office, that is, it imposes certain duties which might have been assigned to officers specially appointed or elected for that purpose to be performed by officers already appointed for general service. See *Freeman v. Commissioners*, 217 N.C. 209.

It is clear that under G.S. 122-35.20 the General Assembly was merely imposing additional duties of the member of the area mental health board upon the office of county commissioner, that he was to perform these additional duties ex officio to his office as county commissioner, and that his term as a member of the mental health board would terminate when his term of office as county commissioner expired. Thus we conclude that the individual in question is holding only two public offices, to-wit, as a member of the county board of commissioners and as a trustee of the county technical institute and that the position as a member of the area mental health board is not an additional public office but merely the imposition of additional duties upon the office of county commissioner and that this individual may serve in these capacities concurrently under Article VI, Section 9 of the North Carolina Constitution, G.S. 128-1.1 and G.S. 122-35.20.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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22 August 1973

Subject: Motor Vehicles; Violations; Driving
Without a License; G.S. 20-23.1.

Requested by: Honorable I. C. Crawford
 North Carolina Senate

Question: Where a driver who has no driver's license has been convicted of an offense which carries with it a mandatory revocation or suspension of license, if that driver thereafter drives without a license and during the period any revocation or suspension would have been in effect had he possessed a license at the time of the original offense, has such driver violated G.S. 20-28, driving while license is suspended or revoked?

Conclusion: Yes, if G.S. 20-23.1 had been applied upon the original violation.

G.S. 20-23.1 provides that "In any case where the Department would be authorized to suspend or revoke the license of a person, but such person does not hold a license, the Department is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held an operator's or chauffeur's license, . . . " whereupon, in the discretion of the Department, penalties of Chapter 20 shall thereafter apply in the same manner as if the license had been suspended or revoked.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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22 August 1973

Subject: Taxation; Real Estate Excise Stamp Tax;
 Conveyance by Stockholder to
 Wholly-Owned Corporation; G.S.
 105-228.29

Requested by: Mrs. Lois C. LeRay
Register of Deeds
New Hanover County

Question: Are real estate excise tax stamps required when an individual conveys real property to his wholly-owned corporation "for business convenience" and "without consideration"?

Conclusion: A conveyance by an individual to his wholly-owned corporation for "business convenience" and "without consideration" is not subject to the excise stamp tax on conveyances.

A corporation is owned by John Doe and wife, Mary Doe, and John Smith and wife, Mary Smith. The same parties own a tract of land which they convey to their corporation "for business convenience" and "without consideration". Must excise tax stamps be placed on the deed, pursuant to the provisions of G.S. 105-228.28, *et seq.*? Upon the facts stated, we think not.

G.S. 105-228.29 provides that the excise stamp tax shall not apply "to transfers of an interest in real estate by operation of law, by lease for a term of years, by or pursuant to the provisions of a will, by intestacy, by gift, by merger or consolidation, or by instruments securing indebtedness, or any other transfer where no consideration in property or money is due or paid by the transferee to transferor." Assuming the accuracy of the assertion that there has been transferred between the parties "no consideration", the exclusion provided by G.S. 105-228.29 would apply and no tax would be due.

A corporation is a distinct legal entity, and where it takes title to real estate, it holds the same in its own name and right regardless of the fact that the transferors may be its only stockholders, and we find nothing peculiar to the stockholder relationship sufficient in and of itself to impute consideration and to require the imposition of the tax. However, we must make the following caveat: a conveyance for both "business convenience" and "without

consideration" appears to be somewhat contradictory. If in fact consideration in property or money is due or paid, as would be the case where a stockholder receives shares of stock as a result of the transfer of property to the corporation, then not only would the taxes be due and recoverable pursuant to G.S. 105-228.33, but the transferor would run the substantial risk of being found to be in violation of the criminal provisions of G.S. 105-228.34.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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22 August 1973

Subject: Motor Vehicles; Drunken Driving;
Mandatory Revocation of License in Event
of Refusal to Submit to Chemical Tests.

Requested by: Lt. M. S. Niven
Monroe Police Department

Question: Is it necessary for an officer to arrest and
charge a person for the offense of driving
under the influence of intoxicating
beverages before that person is subject to
revocation of license for refusal to submit
to chemical test?

Conclusion: Yes.

While former G.S. 20-16.2 did not specifically state revocation for refusal to submit to test was contingent upon arrest for driving under the influence, the statute, as properly interpreted, required such arrest. The rewrite of G.S. 20-16.2, Senate Bill 86, Chapter 206, Session Laws 1973, which went into effect July 1, 1973, expressly provides that revocation for refusal to submit to test is contingent upon first having been arrested for driving under the influence.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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22 August 1973

Subject: Elections; Corrupt Practices; G.S. 163-259, *et seq.*; United States Constitution, Article VI, § 2; "Supremacy Clause"; State Regulation of Congressional and Senatorial Elections.

Requested by: Honorable Ernest Messer
House of Representatives

Question: Does the General Assembly of North Carolina have the authority to regulate campaign practices and expenditures of candidates for North Carolina seats in the United States Congress?

Conclusion: Subject to existing federal legislation to the contrary or which pre-empts the field, the General Assembly of North Carolina does have the authority to regulate campaign practices and expenditures of candidates for North Carolina seats in the United States Congress.

The General Assembly has the authority to regulate elections held in North Carolina. That authority to regulate elections and campaigns related thereto extends to *all* elections, even elections to North Carolina seats in the United States Congress subject to contrary provisions of federal law and subject to federal law which pre-empts the field.

The doctrine of federal supremacy is based on Article VI, § 2 of the Constitution of the United States which reads as follows:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Article I, Section 5 of the Constitution of North Carolina acknowledges the effect of the "supremacy clause" of the Constitution of the United States in these terms:

"Sec. 5. *Allegiance to the United States.* Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force."

The Constitution of the United States takes precedence over the Constitution of North Carolina, *Constantian v. Anson County*, 244 N.C. 221 (1956), and over the laws of North Carolina.

The effect of the "supremacy clause" of the Constitution of the United States construed with Article I, Section 5 of the North Carolina Constitution is to bar legislation by the General Assembly of North Carolina regulating campaign practices and expenditures of candidates for North Carolina seats in the United States Congress whenever such State legislation purports to deal in an area in which the federal law has expressly or by implication pre-empted or fully occupied the legislative field or whenever the State law in question has the effect of contravening or subverting a valid law of the United States.

While reported decisions do not abound, this opinion appears to coincide with the recent practice in at least three states of which we are now aware. In Iowa, Oregon and Texas there have been enacted in 1973 state laws which on their face purport to regulate election campaign spending and practices and include federal offices within their scope. (Iowa Regular Session 1973, Senate Bill 583, July 20, 1973; Oregon Regular Session 1973, Chapter 744, House Bill 3077, July 25, 1973; and Texas Regular Session, House Bill

4, June 14, 1973.)

The federal law is the Federal Election Campaign Act of 1971 (P.L. 92-225, 86 Stat. 3). Section 403 thereof contemplates that there may also be state legislative enactments in the area:

"Sec. 403. (a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

(b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in section 301(f) of this Act) which he could lawfully make under this Act."

Pending federal legislation, if enacted, could further restrict the General Assembly's freedom to act in this area. Though some of the pending proposals expressly attempt to mesh with existing legislation on campaign financing (see 93rd Congress, S. 1189, § 9), other bills expressly pre-empt any provision of state law relating to election to federal office (93rd Congress, S. 372, § 16).

Robert Morgan, Attorney General
Sidney S. Eagles, Jr.,
Assistant Attorney General

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22 August 1973

Subject: Courts; Costs; Jail Fees; Person in Jail
Liable for Jail Fees Each Day of
Confinement or Fraction Thereof.

Requested by: Honorable H. C. Tucker
Clerk Superior Court
Anson County

Question: If a person is placed in jail one hour before midnight and is released one hour after midnight, is he liable for two days' jail fees under G.S. 7A-313?

Conclusion: The person is liable for two days' jail fees since he was in jail a fraction of two different days.

G.S. 7A-313 provides that any person lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of \$3.00 for each day's confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if a *nolle prosequi* is entered, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Thus if the person is placed in jail one hour before midnight and is released one hour after midnight, he has been confined a fraction of two different days and would be liable for jail fees for two different days.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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23 August 1973

Subject: Elections; Qualification of Voters;
Incompetents Not Disqualified to Vote;
Legislature May Not Prescribe
Qualifications for Voters Different From
Those Found in the Constitution.

Requested by: Mr. H. Rutherford Turnbull, III
Assistant Director
Institute of Government

Question: May a person who has been adjudged incompetent and not restored to sanity be denied the right to vote if otherwise qualified?

Conclusion: No.

There is no constitutional provision which prohibits an incompetent from voting and the North Carolina Supreme Court has held that the General Assembly has no power to prescribe qualifications or disqualifications for voters in addition to those set forth in the Constitution.

Sections 1 and 2 of Article VI of the North Carolina Constitution set forth the qualifications for voters and there is no provision within Article VI of the Constitution which disqualifies a person as a voter due to incompetency.

The North Carolina Supreme Court has stated that the General Assembly cannot in any way change the qualifications of voters in State, county, city or town elections. *People, ex rel, Van Bokkelen v. Canaday*, 73 N.C. 198; *Owens v. Chaplin*, 228 N.C. 705; *Smith v. Carolina Beach*, 206 N.C. 834.

G.S. 163-55 was amended by the 1973 General Assembly to delete from the class of persons not allowed to register or vote the words "idiots and lunatics". Chapter 475, Session Laws of 1973, entitled "Patients Rights Bill", provided that each patient in a State hospital for the mentally ill or retarded retains the right to register and vote unless adjudicated incompetent and not restored to sanity as provided by statute.

Thus the effect of this act is to disqualify a person from voting who has been adjudged incompetent and has not been restored to sanity.

The effect of this bill is to add an additional qualification for a voter, to-wit, sanity, and it is the view of this Office that the decisions of the North Carolina Supreme Court to the effect that the General Assembly has no power to change the qualifications of a voter would be applicable to the provisions of Chapter 475,

Session Laws of 1973.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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24 August 1973

Subject: Motor Vehicles; Size of Vehicles and
Loads; Length

Requested by: Mr. R. B. Parker, Assistant Director
License and Theft Division
Department of Motor Vehicles

Question: Does G.S. 20-116(e) prohibit the hauling
of logs or poles so loaded as to exceed the
55 feet maximum when such logs or poles
could be loaded so as to keep the
maximum overall length of the vehicle
within the 55 feet maximum?

Conclusion: Yes.

G.S. 20-116(e) states in pertinent part:

"(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of fifty-five feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, . . ."

Under the wording of section (e) set out above, if a vehicle can be loaded so as to stay within the 55 feet maximum length, such must be done. The exception was intended to allow the movement of objects of a structural nature which cannot be readily dismembered or poles or pipe the utility of which would be lost if dismembered.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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24 August 1973

Subject: Obscenity; Pre-emption of Local Statute by
State Law Regulating Obscenity

Requested by: Mr. Herman Edwards
Attorney for Town of Murphy

Question: Would a local ordinance proscribing
obscene materials be pre-empted by an
enactment of the General Assembly
proscribing obscene materials and having
Statewide application?

Conclusion: A local ordinance proscribing obscene
materials would be pre-empted by an
enactment of the General Assembly
proscribing obscene materials and having
Statewide application if the ordinance
conflicted with the State statute.

G.S. 14-190.1 through G.S. 14-190.9 is the current statute enacted by the General Assembly for the Statewide regulation of sexually oriented materials. It deals in detail with the definition of dissemination (G.S. 14-190.1(a) (1) through (4)); the definition of obscenity (G.S. 14-190.1(b) (1) through (4)); the standards for judging obscene materials (G.S. 14-190.1(c) (1) through (7)) and establishes an adversary hearing procedure prior to seizure (G.S.

14-190.2).

G.S. 14-190.3 makes exhibition of obscene pictures a misdemeanor. G.S. 14-190.4 makes coercing acceptance of obscene articles or publications a misdemeanor. G.S. 14-190.5 makes preparation of obscene photographs, slides and motion pictures a misdemeanor. G.S. 14-190.6 through 14-190.8 regulate employment of minors in the dissemination of obscene materials and dissemination to minors under the ages of sixteen and twelve years.

The above-cited statute sets forth a comprehensive scheme regulating the dissemination, exhibition and preparation of obscene materials. Local ordinances cannot override statutes applicable to the entire State. *Staley v. Cheek, et al*, 258 N.C. 242 (1962). A local ordinance is superseded by a State statute dealing directly with the same subject where there is conflict between the State statute and the local ordinance. *Davis, et al v. Charlotte, et al*, 242 N.C. 670(1955).

It would appear that G.S. 14-190.1 through G.S. 14-190.9 is a statute which fairly and completely regulates on a Statewide basis obscene materials. It would appear that this legislation has pre-empted the field of obscenity in North Carolina with respect to local ordinances which in any way conflict with it.

Robert Morgan, Attorney General
Emerson D. Wall,
Associate Attorney General

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29 August 1973

Subject:	Motor Vehicles; Driver's License; Limited Driving Privileges
Requested by:	Honorable Leonard Van Noppen Chief District Judge
Question:	When a defendant is convicted of driving under the influence of intoxicants first offense, the trial judge has discretionary

right to grant limited driving privileges to the defendant driver for one year during which his driver's license is revoked. Does he also have the discretionary right to grant limited driving privileges for the additional six months that the license is suspended for the driver's refusal to take the breathalyzer test?

Conclusion:

No.

The provisions of G.S. 20-179(b) cover only the mandatory one-year period of suspension of operator's license for conviction of driving under the influence of intoxicants first offense and as provided in subsection (5) thereof were not intended to be so construed as to repeal any other provision existing in the General Statutes. The six months mandatory suspension of operator's license under the provisions of G.S. 20-16.2 stands separate and apart from the provisions of G.S. 20-179(b) and is not affected thereby.

It would also appear that if a defendant's operator's license is suspended for refusal to take the breathalyzer test at the time he is convicted for driving under the influence of intoxicants first offense and the court in its discretion allows limited driving privileges, the court should take into consideration the suspension that is in effect and allow limited driving privileges only from the date of expiration of the suspension for refusal to take the breathalyzer test. This can be done at the time of trial by simply placing the judgment allowing limited driving privileges in the hands of the clerk of court to be given to the defendant on the effective date thereof.

Robert Morgan, Attorney General
W. W. Melvin,
Assistant Attorney General

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29 August 1973

Subject: Social Services; Participation in General Assistance Programs; Entitlement of Individuals Becoming Eligible for Federal Supplementary Security Income Program On or After January 1, 1974

Requested by: Dr. Renee Westcott, Director
Division of Social Services

Question: May assistance be granted under the new General Assistance Program authorized by Part 6, Article 2, Chapter 108 of the General Statutes of North Carolina when an individual becomes eligible for the Federal Supplemental Security Income Program on or after January 1, 1974, and, at that time, possesses the qualifications which would have rendered him eligible under the Aid to the Aged and Disabled category in effect before January 1, 1974?

Conclusion: Assistance may be granted under the new General Assistance Program authorized by Part 6, Article 2, Chapter 108 of the General Statutes of North Carolina when an individual becomes eligible for the Federal Supplementary Security Income Program on or after January 1, 1974, and, at that time, possesses the qualifications which would have rendered him eligible under the Aid to the Aged and Disabled category in effect before January 1, 1974.

The pertinent language leading to this conclusion is found in the provisions of G.S. 108-62, effective July 1, 1973:

"§ 108-62. *Purpose and eligibility.*--Assistance may be granted under this Part to persons who would have been eligible under the aid to the aged and disabled

category prior to January 1, 1974, but who after such date do not qualify under the Federal Supplemental Security Income Program, including needy spouses, essential persons, certain disabled persons, and those persons needing supplemental payments in boarding homes, rest homes, and convalescent homes for the aged or infirm and those needing attendant care at home. Nothing in this Part should be interpreted so as to preclude any individual county from operating any program of financial assistance using only county funds."

As has been noted in a prior opinion of this Office, the General Assistance Program is to be funded by State funds and by federal grants, where the latter are available. However, the basic legislative purpose behind this statute was a desire to insure that assistance is provided to the individuals described therein in situations where they will no longer be entitled to federally funded assistance of this sort. See opinion of the Attorney General to Dr. Renee Westcott, Commissioner, North Carolina Department of Social Services, 42 N.C.A.G. 309 (1973).

It appears that by virtue of recent federal legislation (Public Law 9366, 93rd, 1st Session) individuals who are already receiving this type of assistance prior to January 1, 1974, will automatically be entitled to federal funding of the type of general assistance described in G.S. 108-62 after that date. However, there is no such entitlement to federally funded assistance of this type for those personnel who had not met the conditions of eligibility prior to the first day of 1974. As to these individuals, in accordance with the recognized intent of the General Assembly as described previously, it is clear that they will fall within the provisions of G.S. 108-62 so as to be authorized to receive general assistance from funds appropriated by the State of North Carolina.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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29 August 1973

Subject: State Publications; University of North Carolina at Greensboro; G.S. 147-50; Appellate Division Reports; Advance Sheets

Requested by: Mr. Robert Grey Cole, Documents Librarian
Walter Clinton Jackson Library
University of North Carolina at Greensboro

Question: Is the Library of the University of North Carolina at Greensboro entitled to receive at no cost copies of the *Advance Sheets* of the *Appellate Division Reports* under the provisions of G.S. 147-50 or 147-45 when construed in the light of G.S. 7A-6?

Conclusion: Yes. The University of North Carolina at Greensboro Library is entitled to be furnished the *Advance Sheets* of the *Appellate Division Reports* at no cost pursuant to the provisions of G.S. 147-45.

The appropriate statute involved in this controversy is G.S. 7A-6 which provides generally for sale by the Administrative Officer of the Courts of the "reports and advance sheets of the appellate division, *to the general public*, at a price not less than cost nor more than cost plus ten percent (10%), to be fixed by him in his discretion." (Emphasis added), the proceeds to go to the State treasury, and a specific directive to the Administrative Officer of the Courts to furnish one copy of the *Advance Sheets* at no charge to justices and judges, solicitors, prosecutors and in greater numbers to the Supreme Court Library.

The provisions of G.S. 7A-6 relating to specific direction for free copies to each judge, etc., date back to 1967 (1967, C.108, s.1). The portion permitting sale of the publication to the general public was added later in the 1967 session (1967, C.691, s.57).

G.S. 147-50 is the general policy directive that all State departments must furnish at no cost on request copies of their "reports, bulletins, maps or other publications" to a list of named institutions. University of North Carolina at Greensboro was included in that list in 1967 (1967, C.1065). This statute has been construed in Attorney General's Opinions to require that periodic publications analogous to the Advance Sheets, the Attorney General's Reports, be distributed at no cost to requesting institutions listed in the statute. (42 N.C.A.G. 94). The logic supporting that opinion is applicable here.

G.S. 147-45 deals with "Session Laws", "Senate and House Journals" and "Appellate Division Reports" and directs that "(and the Administrative Officer of the Courts, with respect to Appellate Division Reports) shall, at the State's expense, as soon as possible after publication, distribute such number of copies . . . as is set out" G.S. 147-45. The University of North Carolina at Greensboro is on this list of recipients. (1971 Cum.Supp. to General Statutes, Vol. 3C, p.263).

The Governor may administratively delete from the list any named "government official, department, agency or educational institution." G.S. 147-45. However, we are not aware that the University of North Carolina at Greensboro has been administratively deleted from the applicability of G.S. 147-45.

The sole remaining basis on which free distribution of *Advance Sheets* of the *Appellate Division Reports* could be denied is that in G.S. 147-45 the General Assembly intended that only bound volumes of the Court of Appeals Reports and Supreme Court Reports and not *Advance Sheets* were to be distributed free to the listed educational institutions.

This position we find untenable in light of the language requiring distribution "as soon as possible after publication" (G.S. 147-45) and the public policy of having all State publications as widely and promptly disseminated as possible. The term "Appellate Division Reports" includes in usage and was contemplated by the General Assembly to include the *Advance Sheets* which are an integral part of the overall publication. The usefulness of the *Appellate Division Reports* to any student or citizen is substantially and materially

lessened if the entire publication, including *Advance Sheets*, is not available.

Consequently, we are of the opinion that G.S. 147-45 requires distribution of one copy of the *Advance Sheets* of the *Appellate Division Reports* to the University of North Carolina at Greensboro at no cost as soon as each pamphlet is published. The language of G.S. 7A-6 does not lessen this requirement but merely specifies an additional list of court personnel to whom the publications must be made available.

Robert Morgan, Attorney General
Sidney S. Eagles, Jr.,
Assistant Attorney General

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31 August 1973

Subject: Mental Health; Treatment Facilities;
Definition; Local Mental Health Centers
and Area Mental Health Programs

Requested by: Mr. R. Patterson Webb
General Business Manager
Department of Human Resources
Division of Mental Health

Question: Are local mental health centers and area
mental health programs treatment facilities
within the purview of Chapter 726 of the
1973 Session Laws?

Conclusion: Local mental health centers and area
mental health programs are treatment
facilities within the purview of Chapter 726
of the 1973 Session Laws.

Under G.S. 122-1, as rewritten by Chapter 476 of the 1973 Session Laws, the Department of Human Resources is given all authority

and responsibility previously vested in the Department of Mental Health.

Chapter 726 of the 1973 Session Laws rewrites Article 5 of Chapter 122 of the General Statutes relative to involuntary commitment of mentally ill or inebriate persons to treatment facilities. G.S. 122-58.2(8) defines "treatment facility" as "any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any *community* mental health clinic or center administered by the State of North Carolina," (Emphasis added)

G.S. 122-35.1 through G.S. 122-35.12 provide for the establishment and operation of local mental health clinics. G.S. 122-35.1 designates the Department of Human Resources as the State agency authorized to administer minimum standards and requirements for mental health clinics as conditions for participation in federal-State grants-in-aid and to promote and develop community mental health outpatient clinics in accordance with the provisions of Chapter 122. G.S. 122-35.3 provides that the Department of Human Resources is authorized to establish community mental health services within a framework of policies which provide for the joint operation of mental health clinics within local communities which agree to participate financially and otherwise in the program. In such arrangement the Department of Human Resources represents the State of North Carolina and a local mental health authority represents the community.

Under G.S. 122-35.7 each clinic established pursuant to the provisions of Article 2A of Chapter 122 shall be operated under the supervision of the Department of Human Resources and G.S. 122-35.6 provides that all clinics are to be considered joint undertakings by that Department and the local mental health authority.

Article 2C of Chapter 122 of the General Statutes provides for the establishment of area mental health programs. Under G.S. 122-35.19 such programs are joint undertakings of the counties or portions

thereof included in the designated area and the Department of Human Resources. Further, under G.S. 122-35.20(e) the area mental health board is subject to the rules and regulations of the State Commission for Mental Health Services.

It is the opinion of this Office that the State of North Carolina through its Department of Human Resources administers community mental health clinics and centers and either administers or operates area mental health programs. The words "treatment facilities" include not only hospitals and institutions operated directly by the State but also area and local facilities administered by the State through its Department of Human Resources. Hence, the foregoing conclusion.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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5 September 1973

Subject:	Mental Health; Commitment to Treatment Facilities; Reporting to Commissioner of Motor Vehicles
Requested by:	Dr. Granville Tolley, Assistant Director Department of Human Resources Division of Mental Health Services
Question:	Is the person in charge of a mental health treatment facility under a duty to report all admissions to the Commissioner of Motor Vehicles?
Conclusion:	The person in charge of a mental health treatment facility is under no duty to report all admissions to the Commissioner of Motor Vehicles, but must, upon request

by the Commissioner of Motor Vehicles, furnish such information as may be requested.

Chapter 475 of the 1973 Session Laws deletes from G.S. 20-17.1 all reference to mental illness and deletes in its entirety subsection (c) which provided for reporting to the Commissioner of Motor Vehicles by the person in charge of the institution every involuntary admission. This statute, as rewritten, reads in pertinent part as follows:

G.S. 20-17.1. "(a) The Commissioner, upon receipt of notice that any person has been legally adjudicated incompetent or has been involuntarily admitted to an institution for the treatment of alcoholism or drug addiction shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle

"(b) If any person shall be adjudicated as incompetent or is involuntarily admitted for the treatment of alcoholism or drug addiction, the clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the Commissioner.

* * *

"(d) . . . The Commissioner shall have authority to make such agreements as are necessary with the persons in charge of every institution of any nature for the care and treatment of alcoholics or habitual users of narcotic drugs, to effectively carry out the duty hereby imposed and the person in charge of the institutions described above shall cooperate with and assist the Commissioner of Motor Vehicles."

This statute is clear and in no manner ambiguous. The clerk of court in which a person is judged incompetent or from which a person is involuntarily admitted for the treatment of alcoholism or drug addiction must report the same to the Commissioner of Motor Vehicles.

Under G.S. 20-17.1(d) the Commissioner is authorized to make agreements with the person in charge of an institution for the care and treatment of alcoholics or habitual users of narcotic drugs and the person in charge of the institution is under a duty to cooperate with and assist the Commissioner by furnishing him with whatever information is necessary in order to enable the Commissioner to make a determination as to whether such person is competent to operate a motor vehicle.

It is the opinion of this Office that a person in charge of an institution for care and treatment of alcoholics or habitual users of narcotic drugs or the mentally ill is under no duty to report the same to the Commissioner of Motor Vehicles. However, such person is under a duty to furnish full information to the Commissioner upon his request.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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10 September 1973

Subject: Public Officers and Employees; Criminal Justice Training and Standards Council; Application of Chapter 17A to Police Officers Appointed by Secretary of the Department of Administration

Requested by: Mr. John Faircloth, Director
Criminal Justice Training and Standards Council

Question: Is Chapter 17A of the General Statutes and the standards established pursuant thereto by the Criminal Justice Training and Standards Council applicable to those police officers appointed by the Secretary of the Department of Administration under G.S. 143-340?

Conclusion: Yes.

G.S. 17A-1 states the findings and policy of the General Assembly as follows:

"The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service."

G.S. 17A-2 provides:

"Unless the context clearly otherwise requires, the following definition applies to this Chapter: 'Criminal justice system' means the State and local law-enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, except constitutional officers."

G.S. 17A-7 requires criminal justice officers to meet the standards adopted by the Council.

Historically, the State Capitol Police were under the Director of General Services, and the police officers' authority was limited to violations of law occurring on State buildings and grounds. G.S. 129-4(6) and (7), prior to 1971, provided as follows:

"(6) To serve as a special police officer, and in that capacity to arrest with warrant any person violating any law in or on, or with respect to, public buildings and grounds, and to arrest, or to pursue and arrest, without warrant any person violating in his presence any law in or on, or with respect to, public buildings

and grounds. Before the Director may exercise the powers of arrest under this subdivision, he shall take an oath, to be administered by the Attorney General, in the following form:

'I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of special peace officer for public buildings and grounds according to the best of my skill and ability, and according to law; so help me, God.'

"(7) To designate as special peace officers such reliable and efficient employees of the Division as he may think proper, who shall have the same powers of arrest as the Director is given herein. Before any officer designated by the Director may exercise the powers of arrest under this subdivision, he shall take an oath, to be administered by the Director, in the same form as the oath herein prescribed for the Director."

On May 4, 1971, the General Assembly enacted Chapter 280, Session Laws of 1971, entitled "AN ACT TO AMEND G.S. 129-4 AS IT RELATES TO THE POWER OF ARREST GRANTED TO THE STATE CAPITOL POLICE." The act provided:

"Section 1, G.S. 129-4(6) and (7) are hereby rewritten to read as follows:

'(6) To serve as a special police officer and in that capacity to have the same power of arrest as the police officers of the City of Raleigh. Such authority may be exercised within the same territorial jurisdiction as exercised by the police officers of the City of Raleigh, and in addition thereto the authority of a deputy sheriff may be exercised on property owned, leased or maintained by the State located in the County of Wake.

'(7) To appoint as special police officers such reliable persons as he may deem necessary, and such officers shall have the same power of arrest as herein conferred

upon the Director. Before the Director or the special police officers may exercise the power of arrest, they shall take an oath, to be administered by any person authorized to administer oaths, as required by law.'"

On July 21, 1971, the General Assembly enacted Chapter 1097 to consolidate the statutes regarding the Department of Administration, and transferred the powers and duties of the Director of General Services to the Director of the Department of Administration, and specifically those contained in G.S. 129-4(1) through (9) as amended by the 1971 General Assembly.

Thus, G.S. 129-4(1) through (9) were transferred to G.S. 143-340 and the subsections redesignated as subsections (15) through (24) respectively, and G.S. 129-4(6) and (7) now appear as G.S. 143-340(21) and (22).

It is clear that persons appointed by the Secretary of the Department of Administration are special police officers; that they have the same power of arrest as police officers of the City of Raleigh, which may be exercised in the same territorial jurisdiction as the Raleigh Police, and the same power of arrest as a deputy sheriff on property located in Wake County which is owned, leased or maintained by the State.

Before the Secretary or the police officers appointed by him can exercise the power of arrest, they shall take the oath prescribed by law. G.S. 143-340(21), (22).

Police officers are public officers and must take the oath prescribed in Article VI, Section 7 of the North Carolina Constitution and the general oath in G.S. 11-11.

Without question, members of the police agency created under G.S. 143-340, by whatever name designated, are police officers with the full power of arrest to the same extent as a Raleigh city policeman or a deputy sheriff of Wake County. Their authority is not limited by statute to public buildings and grounds.

The General Assembly has designated such persons as police officers and has conferred the full power of arrest upon them by statute. Clearly, the police appointed pursuant to G.S. 143-340 constitute

a State law enforcement agency within the criminal justice system as that term is defined in G.S. 17A-2.

We conclude that persons appointed pursuant to G.S. 143-340(22) are subject to the standards adopted by the North Carolina Criminal Justice Training and Standards Council. A finding and declaration of policy by the General Assembly that the administration of criminal justice is of Statewide concern, that it is important to the health, safety and welfare of the people of the State, and is of such nature to require education and training of a professional nature should not be construed to create an island composed of State property, State employees and citizens concerned with affairs of government whose health, safety and welfare are not important enough to warrant protection by qualified police officers.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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11 September 1973

Subject: Municipalities; Streets and Highways;
Powell Bill Funds; Eligibility

Requested by: Mr. T. L. Waters, Manager of Planning and
Research
Department of Transportation and
Highway Safety

Question: Should municipalities not holding an
election of municipal officials within four
years of the Powell Bill allocation in
October of 1973 by reason of the
Municipal Procedures Act be declared
ineligible for Powell Bill funds?

Conclusion: No. Although the Powell Bill Act, G.S.
136-41.1, *et seq.*, which provides for State

aid for municipal streets, requires for eligibility an election of municipal officials to be held within four years next preceding the allocation of funds to municipalities for municipalities incorporated prior to 1945 and the holding of the most recent election required by the applicable charter or statute of municipalities incorporated after 1945, there was no intent on the part of the legislature to affect the eligibility of any municipality by the legislation.

The facts as indicated in a memorandum of July 23, 1973, from the Manager of Planning and Research for the Division of Highways, Department of Transportation and Highway Safety, indicate that several municipalities will not have conducted elections within four years next preceding the allocation of Powell Bill funds in October of 1973 by reason of the revision of the municipal election laws in 1971, now codified as Articles 23 and 23B of Chapter 163 of the General Statutes. The memorandum indicates the Town of Montreat was incorporated in 1967 and the most recent election was held on May 6, 1969. G.S. 136-41.2 provides that municipalities incorporated after 1945 to be eligible must have conducted the most recent election required by its charter or the general law, whichever is applicable. Section 3, Municipal Elections Law, Chapter 835 of the 1971 Session Laws, provides that all clauses of laws whether general, private, special or local are repealed to the extent that they are in conflict with or superseded by this Act, except that provisions of town or city charters providing for elections for the calendar year 1972 shall continue in effect until such elections have been conducted and their results declared. G.S. 136-279, *et seq.* Although you indicate the Town of Montreat will not have held a municipal election of town officials within four years preceding the October allocation, this Office is of the opinion that this would not affect the eligibility unless it is determined that the municipality failed to hold elections in accordance with the Municipal Elections Act after the effective date of the Act, or that it failed to hold elections as required by the applicable statute or charter prior to the effective date of the Municipal Elections Act. The facts for such a determination by this Office are not presented.

The remaining municipalities indicated in your letter were incorporated prior to 1945. The eligibility of municipalities incorporated prior to January 1, 1945, is governed by other provisions. The requirement for eligibility is that no municipalities shall be eligible to receive funds under G.S. 136-41.2 unless it has "within the four year period next preceding the annual allocation of funds conducted an election for the purpose of electing municipal officials and currently imposes an ad valorem tax or provides other funds for the general operating expenses of the municipality". 41 N.C.A.G. 307. According to the information furnished, these municipalities will not have conducted an election within four years prior to the allocation in October, 1973. If the facts are as intimated that no election will have been held by these municipalities within the preceding four years prior to the allocation in October, 1973, by reason of the Municipal Elections Act passed in 1971, then it is questionable that the legislature intended to disqualify these municipalities from receiving Powell Bill funds. Section 3 indicates that "it is the intent of this act to make uniform the laws governing the registration of voters for and the conduct of elections in cities, towns, incorporated villages and special districts in this State". It does not appear that there was any intent by the legislature to affect the eligibility of these municipalities for Powell Bill funds, but only to regulate the elections.

It is the opinion of this Office that if an election of municipal officials is not held within the next preceding four years of the October, 1973, allocation solely by reason of the Municipal Election Procedures Act, Article 23 of Chapter 163 of the General Statutes, the municipalities should not be declared ineligible for Powell Bill funds for this reason. However, the statements furnished by the municipalities do not indicate the reason for failure to hold such an election nor have facts been furnished this Office which show that this is the case. This Office suggests that in each case you obtain information as to the controlling election law from the municipality together with the municipality's explanation of the reason for the failure to hold an election as required for eligibility and determine if the Municipal Elections Procedures Act was in fact the reason the election of municipal officials was not held within four years next preceding the October 1973 allocation.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

12 September 1973

Subject: Motor Vehicles; Gross Receipts Tax;
Method of Reporting

Requested by: Mr. Victor J. Hines, Director
Common Carrier Tax Division
North Carolina Department of Motor
Vehicles

Questions: (1) May a common carrier electing to file
under the provisions of G.S. 20-88(e) file
its gross receipts tax reports reporting only
loaded miles for the purpose of
determining its gross receipts tax due?

(2) May a common carrier be permitted
to change its method of reporting at other
than the beginning of the tax year?

Conclusions: (1) No.

(2) Yes, if it is determined that a change
of reporting is required to comply with the
provisions of G.S. 20-91 and the change is
approved by the Commissioner of Motor
Vehicles.

As to conclusion (1), the applicable statutes read in pertinent part:

"G.S. 20-88. *Property hauling vehicles.*--

* * *

"(e) Common Carriers of Property.--Common carriers
of property shall pay an annual license tax as per the
above schedule of rates for each vehicle unit, and in
addition thereto seven and one-half percent of the
gross revenue derived from such operations: Provided,
said additional seven and one-half percent shall not
be collectible unless and until and only to the extent

that such amount exceeds the license tax or deposit per the above schedule: Provided further, common carriers of property operating from a point or points in this State to another point or points in this State shall be liable for a tax of seven and one-half percent on the gross revenue earned in such intrastate hauls. Common carriers of property operating between a point or points within this State and a point or points without this State shall be liable for a seven and one-half percent tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of property operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a seven and one-half percent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of property be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the Utilities Commission for service over a route within the State which is not now served by any common carrier of property the seven and one-half percent gross revenue tax may be reduced to five percent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of property by this State. Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage from the point of origin to the point of destination on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points.

"In lieu of the seven and one-half percent gross revenue tax levied by this subsection and the deposit required by subsection (b) of this section, common carriers of property may elect to pay a flat rate according to the highest rate provided by subsection (b) of this section for vehicles and loads of the same gross weight operated by contract carriers. The election to so pay must be made at the time license plates are applied for and may not thereafter be changed during the license year except that for the license year 1949 such election, if one is made, must be made on or before July 1, 1949. Vehicles registered and licensed during the license year and after the election herein provided for has been made, must be registered and licensed and the operator shall pay taxes on the operation thereof according to the election made. A failure by a common carrier of property to make an election under this paragraph shall render such common carrier of property liable for the deposit required by subsection (b) of this section and the seven and one-half percent gross revenue tax levied by this subsection.

* * *

"§20.89. *Method of computing gross revenue of common carriers of passengers and property.*--In computing the gross revenue of common carriers of passengers and common carriers of property, revenue derived from the transportation of United States mail or other United States government services shall not be included. All revenue earned both within and without this State from the transportation of persons or property, except as herein provided, by common carriers of passengers and common carriers of property, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as common carriers of property, whether owned by the common carrier of property or hired from another for the transportation of persons or property within the

limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a common carrier of property transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at seven and one-half percent (7 1/2%) of the gross charges authorized by the Utilities Commission or Interstate Commerce Commission on such operation if it had been for hire; and common carriers of property shall maintain accurate records of all operations involving transportation of their own property, in order that said tax may be correctly computed, paid and audited.

* * *

"§20.91. *Records and reports required of franchise carriers.*—(a) Every common carrier of passengers and common carrier of property shall keep a record of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the Commissioner, and such records shall be preserved for a period of three years, and shall at all times during the business hours of the day be subject to inspection by the Commissioner or his deputies or such other agents as may be duly authorized by the Commissioner. Any operator of such a franchise line failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

"(b) All common carriers of passengers and common carriers of property shall, on or before the thirtieth day of each month, make a report to the Department of gross revenue earned and gross mileage operated during the month previous, in such manner as the Department may require and on such forms as the Department shall furnish. If reports are not filed by the thirtieth day of the month following the month

for which the report is made, a penalty of five percent (5%) of gross receipts tax reported will be due. This five percent (5%) penalty must be paid in addition to the gross receipts tax and may not be claimed as a credit against the tag deposit. Provided that the Commissioner may, in his discretion, waive the five percent (5%) penalty upon proof by the carrier that late filing of report was due to extenuating circumstances beyond the control of the carrier.

"(c) It shall be the duty of the Commissioner, by competent auditors, to have the books and records of every common carrier of passengers and common carrier of property examined at least once each year to determine if such operators are keeping complete records as provided by this section of this article, and to determine if correct reports have been made to the State Department of Motor Vehicles covering the total amount of tax liability of such operators.

"(d) If any common carrier of passengers or common carrier of property shall fail, neglect, or refuse to keep such records or to make such reports or pay tax due as required, and within the time provided in this article, the Commissioner shall immediately inform himself as best he may as to all matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional five per cent (5%). Any such common carrier of property or common carrier of passengers, having no records on the basis of which the Commissioner can determine the amount of the tax due by such carrier, shall be assessed on each vehicle at the rate applicable for contract carriers, and any bonds or deposits

theretofore made shall be applied on such assessment and any further amount shall be collected as provided by law.

* * *"

The one case interpreting the above sections of the statutes pertaining to the gross receipts tax is *Freight Carriers v. Scheidt*, 263 N.C. 737 (1965).

In *Freight Carriers v. Scheidt*, *supra*, the Court by interpretation reached the following conclusions:

1. The tax imposed under the gross receipts tax provisions are for the use of North Carolina highways:

"All motor vehicles using the highways of the State are required to register and pay an annual license, G.S. 20-50. The fee payable by motor carriers, except common carriers*, is based on a variable rate per hundred pounds of gross weight, G.S. 20-88(b). Common carriers* pay a fixed rate per hundred pounds of weight, irrespective of the size of the vehicle engaged in commerce. The sums paid by common carriers for licenses are only a prepayment on the amount owing for the use of the highways. They are charged six percent** of the revenues earned in the use of our highways, G.S. 20-88(e)." (P. 738) (* gross receipts common carriers) (**now seven and one-half percent)

2. When a carrier is engaged exclusively in intrastate commerce, the tax applies to all revenues earned (except for the revenue exempt by the statute):

"Where a carrier is engaged exclusively in intrastate commerce, the rule for measuring the tax is simple. The amount owing is six percent*

of revenues" (P. 738) (* now seven and one-half percent)

3. When a carrier is engaged in interstate commerce, North Carolina cannot tax all revenues earned by a carrier but can require a carrier to pay its fair portion of the cost of maintaining our highway system:

". . . North Carolina cannot take six percent* of the revenues derived from the movement of goods in interstate commerce; but it can require plaintiff and other interstate carriers to pay their fair portion of the cost of maintaining our highway system." (Citations omitted) (P. 738) (*now seven and one-half percent)

4. That as indicated by the 1943 (C. 648 S.L. 1943) and 1951 (C 583 S.L. 1951) amendments to the 1937 act, there have been basic changes in the transportation industry:

"* * *

"In the earlier days of our transportation system when goods moved principally by water or rail, the shipper normally made delivery to the carrier at its place of business, and consignee picked up the goods at the end of carrier's line.

"The introduction of the motor vehicle as a common carrier, with its increased mobility, brought additional service. Now it is customary for motor carriers to go to consignor's place of business for the goods to be shipped, and to deliver the shipment to the consignee's place of business. This service appropriately became known as 'pickup and delivery.' Originally it was confined to the city in which the shipment originated or terminated. Increasing popularity led to its extension to the metropolitan area

served by the assembly warehouse. The area covered by pickup and delivery service, according to the testimony in this case, varies materially from locality to locality. Plaintiff's evidence indicates that ten miles, or thereabouts, is the maximum limit of pickup and delivery service for North Carolina assembly warehouses. On the other hand, pickup and delivery service for New York includes all of the State of New Jersey, and a large part of the State of New York.

* * *

5. That common carriers travel numerous miles in assembling goods to make up truck load shipments such being done for the benefit of their own operation:

"* * *

"Carrier experience has demonstrated: A single shipment large enough to require the entire cargo space of a vehicle (truck load) can be moved from one point to another point at less expense than several small shipments moving from several points in the same general area to the same destination or to several destinations in the same general area. For this reason, truck load shipments normally carry a lower rate than LTC (less truck load).

"Orderly and economical transportation of many relatively small shipments necessitates the establishment of a warehouse, at some convenient point or points, where different shipments destined for the same terminal point can be assembled and loaded in one vehicle. These assembly points are in carrier terminology known as 'terminals.' Plaintiff's terminals in this State are located at Winston-Salem, Durham,

Wilmington, Laurinburg, Charlotte, Hickory and Asheville.

* * *

"The relatively small pickup and delivery area served by North Carolina warehouses, or terminals, is too small to fit the needs of motor carriers in assembling goods to make up truck load shipments. For that reason, the carriers have expanded the areas around their warehouses beyond the areas technically described as 'pickup and delivery.' Carriers call for and deliver shipments in this outer area, without additional charge, just as they do in 'pickup and delivery.' These outer areas are called 'peddle runs.' 'Line Haul,' 'pickup and delivery,' and 'peddle run' are trade terms. Each has a clearly defined meaning recognized by common carriers, the Interstate Commerce Commission and our Utilities Commission.

"Whether a particular shipment is a 'peddle run' or a 'pickup and delivery' is determined by contracts which motor carriers make with labor unions representing their employees. The name given a movement determines the driver's rate of pay. The State does not participate in nor is it bound by such contracts.

* * *

6. That 'pickup and delivery' and 'peddle run' mileage should be used in determining North Carolina proportion of mileage between terminals:

"* * *

"The amount which plaintiff has been required to pay has been computed by excluding the

miles traveled in 'pickup and delivery,' but including miles traveled in 'peddle runs.' Plaintiff takes the position that neither 'pickup and delivery' nor 'peddle run' mileage should be used in determining North Carolina's proportion of the mileage 'between the respective terminals.' Plaintiff argues it has, because of economic pressure exerted by the labor union, been forced into a disadvantageous position, and that the Legislature, recognizing plaintiff's inability to negotiate an economically sound contract with the union, permitted plaintiff to compute mileage between 'terminals.'

"We do not agree with the reasoning on which plaintiff seeks to recover. In our opinion, the word '*terminal*,' as used in the statute, G.S. 20-88(e), means the point of origin or place where the carrier took possession of the shipment, or the point to which the transportation company makes delivery, the final destination of the shipment.* *Great Northern Ry. Co. v. Commodity Credit Corp.*, 77 Fed. Supp. 780(787). The last sentence of the quoted portion of the statute reads: 'Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage *from the point of origin to the point of destination* on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points.' This language, inserted by c. 583, S.L. 1951, is too clear to require interpretation.

* * * " (*Emphasis added)

7. That the prorate upon which the gross receipt tax is based is derived by using total or gross North Carolina miles as the numerator and the total or gross miles from origin to destination as the denominator:

"* * *

"For several years, 'mileage' was ascertained by reference to the truck's manifest, a summary of the information provided by reference to all of the bills of lading issued for goods moving by that vehicle. This method of computing mileage was, because too complicated, abandoned by plaintiff pursuant to an agreement with an auditor representing the State. Legislative enactments prescribing the method of computing a tax cannot so easily be set aside. If the statutory language is cumbersome and produces inequitable results, carriers are not forbidden relief. Their remedy is an appeal to the Legislature to enact more equitable formulae.

"Until the Legislature prescribes some other rule for measurement, the tax must be computed by ascertaining the miles actually traveled by outbound shipments from the place where the carrier takes possession of the shipment, the point of origin, to the State line; and for inbound shipments, the miles actually traveled from the State line to the place where the carrier surrenders possession of the shipment to the consignee, the point of destination. The miles the shipment actually moves in this State is the numerator. The total miles actually traveled by the shipment from the point of origin to the point of destination is the denominator. That fraction determines the portion of the revenue derived from each shipment which is subject to North Carolina's six per cent tax.

In *Freight Carriers v. Scheidt, supra*, the Court was concerned with the question of the inclusion of "peddle run" miles to obtain the total North Carolina miles. We agree that under the wording of G.S. 20-88(e) the conclusion reached by the Court that "peddle run" mileage must be included was the only conclusion that could be reached. We are convinced, however, that the Court by its language did not intend to exclude other miles operated by carriers in North Carolina or outside North Carolina in generating revenue from the total mileage used to determine the North Carolina prorate.

Though G.S. 20-88(e) speaks to revenue earned between terminals, G.S. 20-89 governing the method by which the tax is computed provides:

"G.S. 20-89. *Method of computing gross revenue of common carriers of passengers and property.*—In computing the gross revenue of common carriers of passengers and common carriers of property, All revenue earned both within and without this State from the transportation of persons or property, except as herein provided, by common carriers of passengers and common carriers of property, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as common carriers of property, whether owned by the common carrier of property or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a common carrier of property transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at seven and one-half percent (7 1/2%) of the gross charges authorized by the Utilities Commission or Interstate Commerce Commission on such operation if it had been for hire; and common carriers of property—shall maintain accurate records of all operations involving transportation of their own property, in order that said

tax may be correctly computed, paid and audited.
(Emphasis added)

* * *"

G.S. 20-91(b) provides in part:

"(b) All common carriers of passengers and common carriers of property shall, on or before the thirtieth day of each month, make a report to the Department of *gross revenue earned* and *gross mileage operated* during the month previous, in such manner as the Department may require and on such forms as the Department shall furnish." (Emphasis added)

Any interpretation placed upon these statutes which would base the gross receipts tax on loaded miles only would defeat the intent and purpose thereof. The tax is for the use of the highways and to do other than use the total miles operated by the carrier in generating revenue would not accomplish the stated purpose. This is borne out by the flat rate fee schedule paid if the carrier elects to operate on a flat rate basis which is also the rate assessed if a carrier electing to license under the gross receipt provisions fails or refuses to keep required records.

We are of the opinion that gross revenue and total miles simply mean all of the revenue earned by the carrier and the total miles traveled in generating such revenue allowing of course the exemptions set forth in the statutes. Therefore, the reporting of loaded miles only for the purpose of determining the North Carolina prorate to be applied to determine the tax due should not be allowed.

As to conclusion (2), if it is agreeable with the Commissioner of Motor Vehicles for a common carrier to revise its method of reporting during the tax year, we see nothing in the statutes to prohibit such change. It is clear, however, that records must be kept of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the Commissioner in order that the required tax may be correctly computed, paid and audited or the carrier failing to do so is subject to flat rate assessment.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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12 September 1973

Subject: Streets and Highways; Lease of
Right-of-Way for Private Use; Ferries

Requested by: Mr. Billy Rose
State Highway Administrator

Question: Is the Board of Transportation authorized by law to lease to a private corporation for their private use or to enter into an agreement for the joint use of a portion of the property acquired by the State Highway Commission under the power of eminent domain for a ferry docking facility at Southport?

Conclusion: No. The Board of Transportation has no authority to enter into an agreement for the joint use or to lease to a private corporation a portion of the property acquired by eminent domain for highway purposes and still needed for the purposes for which it was acquired.

The State Highway Administrator advises in memorandums of July 16, 1973, and August 13, 1973, that the Board of Transportation proposes to enter into an agreement to permit the Carolina Cape Fear Corporation to dredge a portion of the property at the Southport Ferry site and then provide for joint use of the waterway and the exclusive use of a portion of the dredged area to be used by the corporation in connection with a docking facility to be constructed by it. The land in question together with control of access thereto was acquired in fee simple by eminent domain by

the State Highway Commission (now Board of Transportation), acting under the provisions of Article 9, Chapter 136 of the General Statutes, for the purpose of construction of a ferry road, ferry basin and ramps under State Highway Project 6.800862, Brunswick County. The facts as indicated are that this property is not surplus but is needed for the purposes for which it was acquired. However, the private use of the property by the corporation would not interfere with the use by the State.

This Office is of the opinion that the Board of Transportation has no authority to lease to Carolina Cape Fear Corporation or enter into an agreement for the joint use of a portion of the property acquired by condemnation for right of way for the ferry operation facilities at Southport.

Chapter 136 of the General Statutes authorizes the Board of Transportation to acquire property for State highways, but it does not vest in the Board of Transportation the right to acquire property, except for public use. *Commission v. Asheville School, Inc.*, 276 N.C. 556 (1970). The taking of property by the Board of Transportation for other than a public use would be a violation of Article 1, Section 17 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. *Commission v. Batts*, 265 N.C. 348; 1 Lewis, Eminent Domain ¶ 315, page 595.

The complaint and the judgment in the condemnation action in which the property in question was acquired recite that the property was acquired for right of way for highway purposes. The scope and history of North Carolina statutory law indicates a legislative intent to include ferries within the term "highway". *Shipyard v. State Highway Commission*, 6 N.C. App. 649, page 654. See also 1 Lewis, Eminent Domain, ¶ 261, page 522. As the ferry is considered a highway and the land was acquired by eminent domain by the State Highway Commission as right of way for highway purposes, the subject property should be treated the same as other highway right of way for the purpose of the question.

The general rule is that land condemned for highway purposes may not be leased or used for private purposes. 26 Am. Jur., 2d "Eminent Domain", ¶ 143, page 806, and ¶ 144, page 807; 30 C.J.S. "Eminent

Domain", ¶ 459, page 662. Compare *Wishart v. Lumberton*, 254 N.C. 94 at page 96 and 40 N.C.A.G. 502.

The power to authorize the use of highways for a special purpose or in a special manner is vested in and controlled by the legislature, and may be exercised directly by the legislature or delegated to governmental agencies. Where such power has been delegated, the power is measured by the statute or charter provisions delegating such authority. 39 Am. Jur. 2d, Highways, Sec. 214, *Elizabeth City v. Banks*, 150 N.C. 407; 64 C.J.S. *Municipal Corporations*, § 1719, page 136. Condemnation establishes in the Board of Transportation a right to use the land appropriated for all purposes which the Board is authorized by law to subject the right of way. *Hildebrand v. Telephone Co.*, 221 N.C. 10 (1942). The Board of Transportation has the power to make changes in the highway system and alter or abandon highways under the authority of G.S. 136-54. It has authority to permit encroachments as authorized under G.S. 136-93 and G.S. 136-18 and the authority to establish and operate ferries under the authority of Article 6 of Chapter 136. No authority was discovered that gives the Board of Transportation the authority to grant to a private corporation the right to use portions of right of way to the exclusion of the remainder of the public, which was acquired for highway purposes and is still needed for the purpose for which it was acquired.

The question is analogous to the question presented in the case of *Clayton v. Tobacco Co.*, 225 N.C. 563 (1945). The *Clayton* case involved the question whether a municipality, with express legislative authority, could grant the owner of buildings abutting on opposite sides of a city street permission to erect a passageway over a street connecting those buildings. The passageway, or arcade, was to be used exclusively for private purposes. The Court, answering in the affirmative, quoted with approval holdings which stated that without legislative authority therefor a municipality may not permit encroachments upon streets for private purposes, but that the inference from these decisions was that, *with express legislative authority*, a municipality may permit encroachments on public streets for private purposes, provided the public use of the streets is not unreasonably obstructed. Prior to the passage of G.S. 160A-274 by the General Assembly, municipalities, except by special acts and local charter provisions, had no express authority to permit

encroachments for private purposes. *Clayton v. Tobacco Co.*, 225 N.C. 563. G.S. 160A-273 gives municipalities the authority to grant easements (including air rights over a street right of way for the purpose of constructing a bridge or passageway between buildings) over, through, under or across any city property or the right of way of any public street or alley that is not a part of the State Highway system. Unlike municipalities, the legislature has not given the Board of Transportation the express authority to grant to corporations or individuals the right to grant easements or to make private use of rights of way acquired for and still needed for highway purposes.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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14 September 1973

Subject: Social Services; Adoption of Minors;
Venue; G.S. 48-12

Requested by: Mr. Robert M. Blackburn
Clerk of Superior Court
Mecklenburg County

Question: Are the venue provisions of G.S. 48-12(a) mandatory in light of the amendments to G.S. 48-12 by the 1971 Session Laws, Chapter 233?

Conclusion: The venue provisions of G.S. 48-12(a) are not mandatory in light of the amendments to G.S. 48-12 by the 1971 Session Laws, Chapter 233, except when objection is filed under G.S. 48-12(b).

An opinion of the Attorney General to Mrs. Joan C. Holland Supervisor of Adoptions, Department of Social Services, dated 30

November 1970 (41 N.C.A.G. 180), concluded that the venue provisions of G.S. 48-12 were mandatory. Subsequent thereto, the legislature amended G.S. 48-12 by adding subsections (b) and (c).

Subsection (b) of G.S. 48-12 now states in part that "the petition may be filed and the proceeding may be completed in any other county unless a parent or guardian . . . shall file a written objection" Subsection (c) of G.S. 48-12 now reads in part that "in the event of the filing of an objection in accordance with subsection (b), venue shall thenceforth be as described in subsection (a)"

The legislative intent is to render the venue provisions of subsection (a) mandatory only in the event that a parent, guardian or other person, as described in subsection (b), files an objection to the venue in accordance with subsection (b).

Therefore, it may be concluded that, absent an objection, an adoption proceeding may be conducted and venue may be changed to a county other than one described in subsection (a).

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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14 September 1973

Subject: Divorce; Trial by Jury or by the Court;
G.S. 50-10; G.S. 1A-1, Rules 38 and 39;
Chapter 460 of the 1973 Session Laws

Requested by: Mr. Allen W. Harrell
District Court Judge
Seventh Judicial District

Question: Does G.S. 50-10, as rewritten by the 1973
Session of the General Assembly, authorize
divorce cases based on a one year

separation where service of process is accomplished by publication in local newspapers?

Conclusion:

G.S. 50-10, as rewritten by the 1973 Session of the General Assembly, does authorize a trial without a jury in divorce actions based on separation where service of process is by publication in local newspapers if the right of jury trial is not demanded pursuant to G.S. 1A-1, Rules 38 and 39.

Prior to being rewritten by the 1973 Session of the General Assembly, G.S. 50-10 provided that all divorce actions had to be tried by a jury except those actions where the divorce was based on a one year separation where the defendant had been personally served with summons, whether within or without the State, or whether the defendant had accepted service of summons, whether within or without the State.

However, G.S. 50-10 has been rewritten to read as follows:

"The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury. *The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39.* On such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact." (Emphasis added)

G.S. 1A-1, Rules 38 and 39, give to any party the right to demand a trial by jury of any issue which is triable of right by a jury. However, such demand must be made not later than ten days after

the service of the last pleading directed to the issue to be tried. If the necessary demand is not made, then the right to a jury trial has been deemed to have been waived.

The Comment which follows G.S. 1A-1, Rule 38, indicates that (d) of Rule 38, which relates to actions wherein a jury trial cannot be waived, referred to G.S. 50-10, before that statute was rewritten in the General Assembly.

Since G.S. 50-10 now allows for the possibility of a non-jury trial in any divorce action, whether based on separation or otherwise, it would appear that G.S. 1A-1, Rule 38(d) would no longer be pertinent to divorce actions. This being the case, a divorce action could lawfully be tried without a jury in those cases which are based on separation but where service of process is accomplished by publication in local newspapers.

Robert Morgan, Attorney General
James L. Blackburn,
Assistant Attorney General

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14 September 1973

Subject: Public Officers and Employees;
Appointment to State Commission for
Health Services of a "County Health
Employee"

Requested by: Mr. David T. Flaherty, Secretary
Department of Human Resources

Question: May a "county health employee" be
appointed to act as a member of the State
Commission for Health Services?

Conclusion: Barring a situation resulting in
disqualification under the provisions of
G.S. 14-234, a "county health employee"

may be appointed to act as a member of the State Commission for Health Services.

Initially, this opinion is limited to the situation involving an employee of the county as distinguished from a public officer, i.e., the former being one occupying a position of employment or contract vis-a-vis the latter being one to whom functions of the sovereign authority of the government have been delegated. Thus, although a commission member is clearly a public officer, since the other position involved is not, then the provisions of G.S. 128-1.1 are not pertinent to this question.

As a result, the only prohibition to be considered in this situation would be one falling within the purview of G.S. 14-234, which provides as follows:

"14-234. *Director of public trust contracting for his own benefit.*--If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board.

"Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such

board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration."

It would appear that in this situation the most sensitive area would result from any responsibility of the Commission for Health Services for hiring or setting the salaries of employees such as the potential commission member. See opinion of Attorney General to Mr. L. A. Grooms, Chairman, Lincoln County Board of Elections, 40 N.C.A.G. 570 (1969).

Presumably, however, the provisions of the Organization Act of 1973 vesting management functions in the Department of Human Resources rather than in the Commission for Health Services would lessen the likelihood of this type of disqualification.

In any event, absent the development of the type of situation proscribed by G.S. 14-234, no other statutory prohibition on an individual holding the two positions as described has been found.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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14 September 1973

Subject: Social Services; Title XIX Medicaid Program; Legal Sufficiency of Stamped Signature as Method of Execution of Provider Signature

Requested by: Dr. Renee Westcott, Director
Division of Social Services
Department of Human Resources

Question: Is a stamped signature legally sufficient for the certification of the fraud statement required by Title XIX Medicaid Program?

Conclusion: A stamped signature is legally sufficient for certification of the fraud statement required by Title XIX Medicaid Program.

Barrett v. City of Fayetteville, 248 N.C. 436 (1958) stated:

"Generally, a signature may be made for a person by the hand of another, acting in the presence of such person, and at his direction, or request, or with his acquiescence unless a statute provides otherwise. A signature so made becomes the signature of the person for whom it is made, and it has the same validity as though written by him.

"In this jurisdiction it is permissible for one to sign his name by himself 'or sign by the adoption of his name as written by another, or he may make his mark, even though he may not be able to write himself.' *Lee v. Parker*, 171 N.C. 144, 88 S.E. 217. But the signature, if written by another, must be made at the request or with the consent of the person whose signature it purports to be."

There being no specific statutory provision otherwise, it is the general law of this State that a signature, made by another, is the legal signature of the person who authorized his signature to be

made. The Associate Regional Commissioner, Region IV, Department of Health, Education and Welfare, has ruled that the federal statutes and regulations contain no specific requirement relative to the method of execution of the signature involved. Therefore, since a physician's signature stamped by an authorized person on the fraud statement required by the Medicaid Program is the physician's legal signature, it is legally sufficient for the certification of the fraud statement.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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14 September 1973

Subject: State Departments, Institutions and
Agencies; Board of Transportation; Motor
Vehicles; Fees for Special Permits

Requested by: Mr. Billy Rose
State Highway Administrator

Questions: (1) Does the Board of Transportation have authority under existing legislation to charge a fee for the issuance of special permits authorized by G.S. 20-119 for oversize and overweight vehicles, provided the fee so charged is established at a level to recover only the administrative cost in the issuance of such permit?

(2) Does the Board of Transportation have authority under existing legislation to charge a fee for the issuance of special permits authorized by G.S. 20-119 where the fee so charged for such permits is established at a level substantially higher

than the administrative cost involved in the issuance of such a special permit?

Conclusions:

No. In view of the absence of any statute granting authority to charge fees for oversize vehicles and in view of the express prohibition of G.S. 20-97(b) prohibiting the charging of additional fees except as authorized by Article 3 of Chapter 20 of the General Statutes, this Office is of the opinion that fees for special permits for oversize vehicles are not authorized.

G.S. 20-119 authorizes the Board of Transportation to issue special permits for vehicles which are in excess of the statutory size and weight. The statute is silent as to fees or charges for permits. No statutory provisions have been found which grant authority to the Board of Transportation to charge fees for permits for oversize vehicles.

Article 3 of Chapter 20 (G.S. 20-38 - G.S. 20-183) regulates the licensing and licensing fees of motor vehicles. G.S. 20-97(b) provides that no additional franchise tax, license tax, or *other fees* shall be imposed by the State against any franchise motor vehicle carrier taxed under this Article. Franchise motor vehicle carriers are a substantial portion of those carriers seeking permits for oversize and overweight load pursuant to G.S. 20-119. In view of the absence of any statute granting authority to charge fees for permits for oversize vehicles and the express prohibition contained in G.S. 20-97(b), this Office is of the opinion that the Board of Transportation has no authority to charge fees for permits issued for oversize vehicles pursuant to G.S. 20-119. See *Kenny Co. v. Brevard*, 217 N.C. 269 (1940).

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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14 September 1973

Subject: Corrupt Practice Act; Employees of Corporation Collectively Making Financial Contributions to Political Candidates Constitutes a Campaign Committee; G.S. 163-259

Requested by: Honorable Thad Eure
Secretary of State

Question: Is an association of employees of a corporation and its subsidiary, who voluntarily pool their resources and collectively make contributions to those political candidates who it feels will best serve the interests of good government and the employees of the corporation, a campaign committee within the meaning of the North Carolina Corrupt Practice Act?

Conclusion: Yes.

The facts presented are as follows: "X" company and its several subsidiaries are North Carolina corporations with operations in five states. The stock of "X" company is closely held by several individuals. The company and its subsidiaries each maintain a home office in North Carolina and collectively employ several thousand individuals throughout their area of operations. The parent corporation and its subsidiaries are engaged in similar sophisticated service industries, and their business activities are horizontally integrated. Because of the nature of these activities, the companies employ a large number of well educated individuals.

Two years ago a key employee of "X" company devised a plan whereby the employees of the company and its subsidiaries could voluntarily pool their resources and collectively make contributions to political candidates supporting programs favorable to the employees' common welfare. As a result of this plan, an association named Partners in Progress was formed by ten officers and employees of "X" company and its subsidiaries. The published

policy of Partners in Progress is to support financially those political candidates who it feels will best serve the interests of good government and the employees of "X" company and its subsidiaries. To this end Partners in Progress has solicited voluntary contributions on a broad scale from employees of the parent corporation subsidiaries. Since the association's formation, approximately 600 employees have made contributions to Partners in Progress. The funds so obtained were pooled by the association, and contributions were made to a large number of candidates of both major political parties at both State and federal levels.

G.S. 163-259 defines the term "campaign committee" to include any committee, association or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the nomination or election of any candidate at any primary, general or special election. The terms "candidates", "contribution", "expenditure", and "person" are all defined in G.S. 163-259. The term "person" includes an individual, partnership, committee, association, corporation or any other organization or group of persons.

It is the opinion of this Office that the association of employees is a campaign committee as that term is defined in G.S. 163-259 and that it should comply with the requirements of the Corrupt Practice Act as it relates to a campaign committee.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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14 September 1973

Subject: State Departments, Institutions and
Agencies; Board of Transportation;
Eminent Domain; Right of Way
Acquisition; Functional Replacement of
Publicly Owned Facilities

Requested by: Mr. W. H. Webb, Jr.
Manager of Right of Way
Department of Transportation and
Highway Safety

Question: Is the Board of Transportation authorized to pay the cost of the "functional replacement" of publicly owned facilities acquired for highway purposes?

Conclusion: No. The Board of Transportation is authorized to pay just compensation for properties acquired for highway purposes in accordance with the measure of damages as provided for in G.S. 136-112.

The Federal Highway Administration proposes to issue new regulations concerning the participation in the cost of acquisition of publicly owned buildings under the program called "Functional Replacement of Publicly Owned Facilities". FHWA requested the Manager of Right of Way to obtain an opinion as to whether or not the Board of Transportation can participate in the program of functional replacement of publicly owned facilities program. There are three FHWA memorandums dated August 29, 1973, March 31, 1972, and March 23, 1972, on the subject matter. These memorandums do not define the functional replacement concept, but it is understood that this is a concept whereby the State pays the cost to replace publicly owned facilities acquired for highway purposes with new facilities without regard to the age, condition, or value of the facilities acquired.

The Board of Transportation is obligated to pay just compensation for property condemned for highway purposes. The type of ownership, whether privately owned or publicly owned, is not determinative of the amount of compensation. The payment to the property owner under the functional replacement concept for publicly owned facilities does not appear to relate to just compensation as defined in court cases in this State, nor to the statutory measure of damages as set out in G.S. 136-112. When property is acquired by deed or right of way agreement, the Board is authorized to pay only the fair market value for lands acquired

for highway right of way from funds appropriated for highway purposes. The payment of additional funds from appropriations for highway purposes for other than highway purposes would not be authorized. See G.S. 143-32. It is the opinion of this Office that in the absence of enabling legislation, the Board of Transportation, when it acquires publicly owned facilities for highway purposes, cannot pay more than "just compensation" as determined in accordance with the principles established by the North Carolina Supreme Court cases.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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19 September 1973

Subject: Taxation; Gasoline Tax; Distribution;
Consignment; G.S. 105-434

Requested by: Mr. Fred W. London, Director
Gasoline Tax Division
North Carolina Department of Revenue

Question: When a distributor (who reports and pays gasoline tax on the basis of gasoline "sold, distributed or used" monthly) delivers gasoline to a service station operator on consignment, does the tax accrue at the time of delivery to the consignee, or at the time the gasoline is sold by the consignee?

Conclusion: The tax accrues upon delivery to the consignee.

G.S. 105-434 taxes "all motor fuels sold, distributed or used within this State." The tax must be paid by "distributors" (defined in G.S. 105-430(2)) by means of a monthly report "showing the quantity of motor fuel sold, distributed or used by such distributor within this State during the preceding calendar month"

The distributor may, instead of selling gasoline to a service station operator, deliver it on consignment, retaining title until sold and billing the operator for the number of gallons metered through the operator-consignee's pumps. When this occurs, does the tax accrue when the gasoline is delivered by the distributor to the consignee, or when the consignee sells it?

There is persuasive authority to support the conclusion that the tax accrues when delivery to the consignee takes place. In *Texas Co. v. Siefried* (1944) 60 Wyo. 142, 147 P 2d 837, a distributor delivered gasoline from storage tanks at its bulk plant to a consignee's tank trucks. The consignee in turn sold the product to highway contractors. The Wyoming court recognized that there was no sale to the consignee upon delivery, but since the tax was based upon "sale, distribution or use", found that withdrawal from storage was "use" by the distributor, and delivery to the consignee constituted "distribution". In view of the similarity of language used in our statute, we are persuaded that the same result should obtain here and advise that, in our opinion, the tax accrues when the distributor delivers gasoline to his consignee.

This is not to say, however, that when a distributor withdraws gasoline from his bulk storage tanks and places that gasoline in a storage tank at a service station owned and operated by the distributor, the same result would apply. In that case, the gasoline remains "stored" and it seems settled in North Carolina that "one cannot distribute to himself" *State v. Nash Johnson and Sons' Farm Inc.* (1964) 263 N.C. 66, 138 S.E. 2d 773, citing *Union Oil Co. v. State* (1940) 2 Wash. 2d 436, 98 P 2d 660.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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19 September 1973

Subject: Motor Vehicles; Dealer's License; Price
Representations

Requested by: Mr. Gonzalie Rivers, Director
License & Theft Division
Department of Motor Vehicles

Question: Does a motor vehicle dealer violate the provisions of G.S. 20-294 by publicizing or quoting a vehicle price which does not include the customary charges for servicing and processing ownership transfer?

Conclusion: G.S. 20-294(6) prohibits a licensed motor vehicle dealer from advertising, publishing, or representing a price which does not include all charges which constitute the total price to the retail customer, except the North Carolina sales tax.

The statute, enacted in 1955, provides:

"G.S. 20-294. *Grounds for denying, suspending or revoking licenses.*—A license may be denied, suspended or revoked on any one or more of the following grounds: . . . (6) Having used unfair methods of competition or unfair deceptive acts or practices." (See also G.S. 20-301)

In 1969, the General Assembly enacted a similar statute which provides:

"G.S. 75-1.1. *Methods of competition, acts and practices regulated; legislative policy.*—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

To enforce the provisions of G.S. 75-1.1, the Attorney General has been given authority to investigate business practices and to prosecute civil actions to restrain and enjoin unfair and deceptive business practices.

The Attorney General's Office has taken the position that adding

extra charges for transferring ownership onto the quoted or advertised price of a motor vehicle would be considered a violation of G.S. 75-1.1. (*Consumer Protection News*, April 1972). In addition, this practice was enumerated as one count of a lawsuit filed against a North Carolina motor vehicle dealer by the Attorney General's Consumer Protection Division. (*State v. Wiygul-Sanders Ford, et al*, 72 CVS 10548, Wake County). The suit was terminated by a consent judgment which prohibits the company from adding a fee for routine transfer of ownership to a customer. Recently, the Division announced an agreement with Raleigh Dodge, Inc., which prohibits that company from adding to its published vehicle prices any charges for preparing the car for delivery or for transferring ownership to a customer. (*Consumer Protection News*, August 1973).

Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) provides:

"Sec. 5. (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

In exercising its authority, the Federal Trade Commission has taken the following actions:

Ordered the respondents to include in all advertised prices for beef the charges for cutting, trimming, wrapping or "any other service or process" required to be paid by the purchaser. *In re Western Star Beef, Inc.*, 75 F.T.C. 139 (Docket C-1479, 1969).

Ordered an automotive repair shop to cease advertising a \$65.00 "overhaul" of automatic transmission unless the advertisement discloses the parts that will and will not be replaced at that price. *In re C & M Automatic Transmission, Inc.*, 74 F.T.C. 1182 (Docket C-1448, 1968).

Ordered a manufacturer to cease advertising a price for an automobile convertible top without disclosing that the rear window price was not included. *In re*

Rayco Mfg. Co., 55 F.T.C. 292 (Docket 7101, 1958).

Ordered an automobile manufacturer to stop price advertising which failed to include all charges to the customer. *In re General Motors Corporation*, 32 F.T.C. 807 (Docket 3173, 1941). In finding the company policy to be a violation of Section 5 of the Federal Trade Commission Act, the following statements were made:

"It is further found from the evidence that respondents have been adding to their advertised price certain charges for intangible items, among others, delivery and handling charge, advertising, new car conditioning, and factory handling charge. The public is deceived unless all such charges are included in the price of the car referred to when a price is named." (32 F.T.C. at 819)

"The acts, practices, and methods of the respondents in using advertisements of the type hereinabove described in connection with the sale and distribution of said passenger motor vehicle in said commerce have had, and now have, the capacity and tendency to mislead and deceive, and do mislead and deceive, a substantial portion of the purchasing public, and have induced, and now induce, a substantial portion of the purchasing public, because of said mistaken and erroneous belief engendered as aforesaid, to purchase a substantial volume of respondents' said passenger motor vehicles with the result that trade has been, and now is being, unfairly diverted to respondents from their competitors who truthfully advertise and represent the prices of their cars and sell them at the price published, represented or designated by them" (32 F.T.C. at 823)

Another manufacturer was ordered to refrain from

deceptive pricing of automobiles by using prices which did not reflect "complete and ready for operation" prices. One practice was denounced in these words:

"In some instances, where statements concerning these extra charges appear in respondent's advertisements, such statements are printed in such fine print as to be almost totally obscured by the larger type or figures featured in the f.o.b. price." *In re Ford Motor Co.*, 33 F.T.C. 1541, 1547 (Docket 3174, 1941).

The similarity of G.S. 75-1.1 and Section 5 of the F.T.C. Act to G.S. 20-294 requires that any interpretation of the former be considered when determining how G.S. 20-294 shall be applied. Clearly, the provisions of these acts have been applied to this issue. It is concluded, therefore, that the publicizing of a vehicle price which does not include customary charges for servicing and for transferring ownership to the customer would constitute an unfair method of competition and an unfair and deceptive act.

Robert Morgan, Attorney General
Eugene Hafer,
William W. Melvin,
Assistant Attorneys General

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21 September 1973

Subject: Social Services; Adoptions; Adjudication of
Neglect or Dependency and Termination of
Parental Rights in a Single Proceeding

Requested by: Mrs. Robin Peacock, Supervisor of
Adoptions
Division of Social Services
Department of Human Resources

Question: May a child be adjudicated neglected or

dependent and parental rights terminated in a single proceeding under Article 23 of Chapter 7A of the General Statutes?

Conclusion:

A child may be adjudicated neglected or dependent and parental rights terminated in a single proceeding under Article 23 of Chapter 7A of the General Statutes.

The question herein presented relates to an opinion of this Office to Mrs. Robin Peacock, dated 19 June 1973 (42 N.C.A.G. 305), in which it was concluded that "before or after a petition for the adoption of a child has been filed, only a finding of abandonment or other finding provided for by G.S. 7A-288, followed by a termination of parental rights, also under G.S. 7A-288, will suffice to obviate the necessity of a finding of abandonment for the purposes of G.S. 48-5(a) and (b)."

G.S. 7A-277, as rewritten by 1973 Session Laws, Chapter 270, states in part that "these procedures (of Article 23) are intended to provide a simple judicial process to provide such protection, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State." G.S. 7A-285 reads in part that "the juvenile hearing shall be a simple judicial process designed to adjudicate . . . and to make an appropriate disposition to achieve the purposes of this Article." G.S. 7A-288 states in part that "in cases where the court has adjudicated a child to be neglected or dependent, the court shall have the authority to enter an order which terminates the parental rights"

The express statutory purpose of Article 23 of Chapter 7A "to provide a simple judicial process" mandates the conclusion that a child may be adjudicated neglected or dependent and parental rights terminated in the same juvenile hearing. Of course, the court must remain committed to the best interest of the child and must remain conscious of the constitutional and statutory rights of the parents. In regards to the former, G.S. 7A-285 provides in part that "the court may continue the case for disposition after the juvenile probation officer or family counselor or other personnel available to the court has secured such social, medical, psychiatric,

psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State." In regards to the latter, G.S. 7A-288 requires that the petition for the hearing which may result in the termination of parental rights specifically set forth the possible scope of the hearing in order to notify the parent and to permit the parent to protect his interest in the child's welfare.

In conclusion, it must be noted that the second paragraph of G.S. 7A-288 speaks in terms of "a special hearing to consider any case involving termination of parental rights." Construed with the other provisions of the Article, in particular G.S. 7A-277, the intent of the phrase is to provide for a separate termination hearing when appropriate but not to mandate it in all instances. For example, a separate termination hearing may be the desired procedure when a dispositional order entered under G.S. 7A-286 is concluded not to have been in the best interest of the child. Therefore, the word "special" should not be regarded as being synonymous with "separate" in every instance.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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24 September 1973

Subject: Municipalities; Ordinances; Enforcement of
Off-Street Parking Lot Regulations Under
Police Powers

Requested by: Mr. Rufus C. Boutwell, Jr.
Assistant City Attorney
City of Durham

Question: In view of the decision in *Britt v. Wilmington*, 236 N.C. 446 (1952), is the rewrite of G.S. 160A-301(b) (Chapter 426, 1973 Session Laws of North Carolina) valid

insofar as it authorizes criminal sanctions to enforce parking regulations in municipally owned off-street parking facilities?

Conclusion: Yes, until declared invalid by a court of competent jurisdiction.

There is a presumption in favor of the constitutionality of a statute, and a statute will be upheld unless it is in conflict with some constitutional provision. 2 Strong Index, Statutes §4, N. 76.

The 1973 rewrite of G.S. 160A-301, in pertinent part, reads:

"(b) *Off-Street Parking*. A city may by ordinance regulate the use of lots, garages, or other facilities owned or leased by the city and designated for use by the public as parking facilities. The city may impose fees and charges for the use of these facilities, and may provide for the collection of these fees and charges through parking meters, attendants, automatic gates, or any other feasible means. The city may make it unlawful to park any vehicle in an off-street parking facility without paying the established fee or charge and may ordain other regulations pertaining to the use of such facilities.

"Revenues realized from off-street parking facilities may be pledged to amortize bonds issued to finance such facilities, or used for any other public purpose."

King v. Baldwin, 276 N.C. 316 (1970) reads in part as follows:

"It is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result; and, in construing a statute, the court always looks to its purpose." (Citations omitted) (at p. 325)

When *Britt v. Wilmington*, *supra*, was decided in 1952, there were 1,297,580 motor vehicles registered in North Carolina. In 1973 when

G.S. 160A-301(b) was rewritten to provide for city-owned and operated off-street parking lots, there were in excess of 3,696,849 motor vehicles registered. It is reasonable to conclude that the legislature took note of the increased number of vehicles registered and the traffic problems resulting therefrom and recognized the necessity of off-street parking facilities for the safety and convenience of the public.

It is to be noted, however, that the authority to use *revenues realized* from off-street parking facilities for any public purpose granted under the rewrite of G.S. 160A-301(b) at best makes doubtful the upholding of enforcement of city-owned, off-street parking lot regulations by criminal sanctions if put to test. See *Britt v. Wilmington, supra*; *State v. Scoggin*, 236 N.C. 1 (1952); *State v. Scoggin*, 236 N.C. 19 (1952); Anno. 8 A.L.R. 2d 373 and Supplement A.L.R. 2d Later Case Service 7-12, page 142.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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27 September 1973

Subject: Motor Vehicles; Chauffeur's License;
Nonresident Taxicab Operator

Requested by: Mr. Henry W. Underhill, Jr.
Charlotte City Attorney

Questions: (1) Does G.S. 160A-304 authorize a municipality to require an operator of a taxicab within its corporate limits to be the holder of a valid North Carolina chauffeur's license when the operator has a valid license from another state?

(2) If so, what effect, if any, does G.S. 20-9(h) (enacted by the 1973 Session of

the General Assembly) have upon such a requirement?

Conclusions:

(1) Only if required by the Department of Motor Vehicles.

(2) Not considered in light of Conclusion No. 1.

G.S. 160A-304(a) reads in pertinent part:

"§ 160A-304. *Regulation of taxis.*--(a) A city may by ordinance license and regulate all vehicles operated for hire in the city. The ordinance may require that the drivers and operators of taxicabs engaged in the business of transporting passengers for hire over the public streets shall obtain a license or permit from the city"

G.S. 20-9(h) reads as follows:

"(h) The Department shall not issue an operator's or chauffeur's license to an applicant who is the holder of any license to drive issued by another state, district or territory of the United States and currently in force, unless the applicant surrenders such license or licenses; provided, this section shall not apply to nonresident military personnel or members of their household."

G.S. 20-7(a) reads as follows:

"§ 20-7. *Operators' and chauffeurs' licenses; expiration; examinations; fees.*--(a) Except as otherwise provided in § 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Department under the provisions of this article. Except as otherwise provided in § 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the

Department under the provisions of this article."

G.S. 20-8(4) reads as follows:

"§20-8. *Persons exempt from license.*—The following are exempt from license hereunder.

* * * *

"(4) A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this State either as an operator or chauffeur;"

G.S. 160A-304(a) grants to cities and towns the authority by proper ordinance to require operators of taxicabs to obtain a *permit* from the city or town before engaging in the business of transporting passengers for hire over the public streets, and not a motor vehicle operator's or chauffeur's license as the issuance thereof is reserved to the Department of Motor Vehicles. G.S. 20-7; *State v. Cooper*, 224 N.C. 100.

Cities and towns can, under the grant of authority contained in G.S. 160A-304(a), require the operator of a taxicab to be properly licensed to operate a motor vehicle pursuant to the North Carolina motor vehicle laws before issuing a permit. However, what constitutes proper licensing in North Carolina is dictated by the motor vehicle laws with the implementation thereof being left solely to the North Carolina Department of Motor Vehicles, subject to review by the court.

In our opinion, if an operator is deemed properly licensed by the Department of Motor Vehicles, the State having acted, cities and towns have no authority to act.

For example, Section 19-69(g) of the Charlotte City Code states that an applicant for a permit to drive a taxicab in the City of Charlotte must be the holder of "an automobile chauffeur's license from the Motor Vehicle Commission of the State". Several of the taxicab drivers in Charlotte live in South Carolina and are unable

to retain their South Carolina license if they wish to obtain a North Carolina license as a result of G.S. 20-9(h) *supra*; thus, they cannot obtain a permit to operate a taxicab in Charlotte. This result is contrary to law. Under G.S. 20-8(4), if properly licensed in South Carolina, such operator is exempt from license under the motor vehicle laws of North Carolina. Therefore, a North Carolina chauffeur's license cannot be a prerequisite to obtaining a permit from the City of Charlotte to operate a cab.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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27 September 1973

Subject: Motor Vehicles; Funeral Processions

Requested by: Chief James C. Sanford
Rural Police, Gaston County

- Questions:
- (1) Is it required by North Carolina law that a police vehicle lead a funeral procession?
 - (2) If a police vehicle is leading a funeral procession in an area having traffic control signals, after the police vehicle has passed through the intersection, is a motorist ever guilty of any criminal offense if he breaks through a funeral procession even when he has the green light?
 - (3) Should an accident occur due to the situation described in Question No. 2, who would be at fault?
 - (4) Would the police department incur civil liability in a case such as this?

(5) Is the practice of police vehicles leading funeral processions nationwide or have other locales found another solution to the problem?

Conclusions:

(1) No.

(2) Yes, under certain circumstances.

(3) Determination of fault is civil in nature and would depend on the facts of any given case.

(4) Possibly, but such is not probable.

(5) Unknown.

As to Conclusion Number 1, we find nothing in the statutes which places the duty of escorting a funeral procession upon police authorities. It is apparent, however, that not only does police escort of a funeral procession lend itself to good public relations, but also to increased highway safety. The practice of police vehicles leading funeral processions is one of long standing.

As to Conclusion Number 2, the motor vehicle laws do not speak specifically to funeral processions. However, G.S. 20-169 provides in part:

"§20-169. *Powers of local authorities.*--Local authorities, except as expressly authorized by §20-141 and §20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rules or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the

highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations" (Emphasis added)

In *Cogdell v. Taylor*, 264 N.C. 424 (1965), the court, interpreting G.S. 20-169, said:

"When automatic traffic control signals are installed pursuant to municipal ordinance authorized by G.S. 20-169, the respective rights of motorists depend upon the provisions of the particular ordinance authorizing such installation. *Cox v. Freight Lines*, 236 N.C. 72, 78, 72 S.E. 2d 25, and cases cited; *Curran v. Williams*, 248 N.C. 32, 34, 102 S.E. 2d 455; *Upchurch v. Funeral Home*, 263 N.C. 560, 140 S.E. 2d 17. G.S. 20-169 also provides that local authorities 'may regulate the use of the highways by processions or assemblages'

"From the foregoing, these propositions appear: (1) The Kinston ordinance is not in conflict with a general statute; and (2) authority for the enactment of the Kinston ordinances relating (a) to automatic traffic control signals and (b) to funeral processions rests on G.S. 20-169. (pp. 427, 428)

* * * *

"In view of the reliance ordinarily placed by motorists upon automatic traffic control signals at street intersections, it seems appropriate to suggest that any ordinance or statute purporting to give priority to funeral processions at intersections otherwise controlled by automatic traffic signals should require compliance with prescribed conditions with reference to identification of such procession as a funeral procession as a prerequisite to reliance upon such ordinance or statute" (pp. 431, 432)

If a city by proper ordinance has given priority to funeral processions pursuant to the provisions of G.S. 20-169, the violation of the ordinance under the provisions of G.S. 14-4 would be a misdemeanor.

As to Conclusion Number 3, the determination of fault must necessarily rest upon the factual situation of any given case. See *Cogdell v. Taylor, supra*; *McBride v. Freeze*, 268 N.C. 681; Anno: Funeral Procession Injury-Liability, 85 A.L.R. 2d 692; 85-91 A.L.R. 2d L.C.S. 44; and *North Carolina Index* 2d, Municipal Corporations, Sec. 33, page 699.

As to Conclusion Number 4, we would be most reluctant to say that a situation could not arise wherein the police in charge of escorting a funeral procession would be civilly liable. However, the possibility is remote unless the escort vehicle was involved or there was gross negligence in procedures.

As to Conclusion Number 5, we could not find sufficient reference material upon which to base a knowledgeable answer. It would appear, however, from the cases reviewed from other jurisdictions that the practice or custom of police vehicles escorting funeral processions is prevalent throughout the United States.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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27 September 1973

Subject: Mental Health; Involuntary Commitment
to Treatment Facilities; Statements of the
Individual as Overt Acts

Requested by: Dr. N. P. Zarzar, Director
Division of Mental Health Services
Department of Human Resources

Question: May a statement by an individual that he plans to kill himself or another person constitute an overt act so as to afford the basis for involuntary commitment under Article 5A, Chapter 122, General Statutes of North Carolina?

Conclusion: Under some circumstances, a statement by an individual that he plans to kill himself or another person may constitute an overt act so as to afford the basis for involuntary commitment under Article 5A, Chapter 122, General Statutes of North Carolina.

G.S. 122-58.3(1) contains the following language relative to the institution of proceedings for involuntary commitment in a State mental institution through the judicial hospitalization route:

"Any person who, by reason of the commission of overt acts, is determined by a law-enforcement officer to be violent and of imminent danger to himself or others, or to be gravely disabled, may be taken into custody by a law-enforcement officer but only for the purpose of obtaining a personal medical examination and evaluation of the person by a qualified physician."

Similar requirements for the existence of "overt acts" as a preliminary to involuntary commitment to State treatment facilities are found throughout the remainder of Article 5A of Chapter 122. Virtually all of the functions required of and the limitations placed on law-enforcement officers, examining physicians, and members of the judiciary in the involuntary commitment proceedings depend upon the presence of "overt acts".

Focusing on the determination of whether the individual is violent and of imminent danger to himself or to others, apparently it is not at all uncommon for this decision to rest solely upon declarations of intent to kill himself or others emanating from the potential patient. Thus, the question of whether declarations of this sort can be equated to "overt acts" becomes of importance to the law-enforcement officer confronted with responsibility for taking

him into custody, the physician confronted with examining him, and the members of the judiciary confronted with adjudication of the case.

Were we to be controlled by the definition of these words as found in criminal cases (such as those involving attempts to commit certain crimes) or in damage suits predicated upon civil conspiracy, these declarations by the individual unaccompanied by actual movements toward the accomplishment of the purpose stated would not be sufficient. However, the situations encompassed here are far different from those involving the need to prove an individual's guilt of a criminal act beyond reasonable doubt or to effect monetary reimbursement of a party for damages suffered through the conspiratorial machinations of another person.

The enunciated policy of the General Assembly in ratification of the present involuntary commitment statutes was to provide for the involuntary commitment of an individual who is dangerous to himself or others or gravely disabled and "to establish procedures which promptly respond to the needs of the person". See G.S. 122-58.1. In accomplishing that end, it would appear that the layman's understanding of this terminology would be a far more applicable guideline than some stilted non-appropriate legal terminology. In other words, an open and observable manifestation of intent by the individual should be adequate to satisfy the statutes concerned.

This opinion is not to be interpreted as indicating that each and every statement of this nature by an individual, regardless of the circumstances, would equate to the described "overt acts". However, if the expert (or at least quasi-expert) opinion of a physician, experienced law-enforcement officer, or responsible jurist is that the statements made are serious, as distinguished from spurious, then they should fall within the category of "overt acts" as required by the pertinent statutes.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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27 September 1973

Subject: Mental Health; Involuntary Commitment to State Mental Hospitals; Standards and Procedures of Commitment of Mentally Ill Criminals

Requested by: Mr. Jerry Morgan, Administrative Officer
Forensic Unit
Dorothea Dix Hospital

Question: What procedures are presently applicable to and what standards govern the transfer of a convict from a penal institution in this State to a State mental hospital?

Conclusion: The proceedings required by Article 5A, Chapter 122, General Statutes of North Carolina, and the standards set forth therein govern the transfer of a convict from a penal institution in this State to a State mental hospital.

Prior to September 1, 1973, G.S. 122-85 was controlling of this situation and provided as follows:

"§122-85. Convicts becoming mentally ill committed to hospital.—All convicts becoming mentally ill after commitment to any penal institution in this State shall be admitted to the hospital designated in §122-83. The same hospitalization procedure as prescribed in article 7 of this chapter shall be followed except that temporary authority for admission of the convict may be given by the clerk of court of the county in which the prison is located, that the prisoner need not be removed from the prison for a hearing, and that the clerk of court of the county from which the convict was sentenced shall issue the order of hospitalization.

"In case of the expiration of the sentence of any convicted mentally ill person, while such person is

confined in said hospital, such person shall be kept in said hospital until transferred or discharged, as provided by §§122-66.1, 122-67 and 122-68."

However, when the 1973 General Assembly ratified new legislation covering the involuntary commitment procedures in this State, *inter alia*, they repealed in its entirety Article 7 of Chapter 122, removed from the clerk of the superior court the commitment authority previously vested in him, and changed the criteria for determining the suitability of involuntary commitment of a given individual.

As a result, the standards for involuntary commitment are governed by the latest expression of the legislative intent, i.e., " . . . no person shall be committed to a treatment facility unless he is determined to be dangerous to himself or others or gravely disabled." See G.S. 122-58.1. If this criteria is met, the case should be processed in the court or courts prescribed in Article 5A, Chapter 122, with the individual receiving the elements of due process required by that Article.

The new statutes regarding involuntary commitment do not in any way prevent a penal institution from maintaining its own medical facilities within the penal institution for the treatment of mental (as well as physical) illness of inmates; obviously no commitment procedures are required for this type of treatment. Additionally, in the past, the argument has sometimes been advanced that, inasmuch as this type of patient is already in the custody of the State, no commitment procedures are necessary for the transfer of an inmate from the penal institution to a State mental hospital. This opinion should not be interpreted as adopting any such position. Quite to the contrary, in view of the change in the nature of the commitment involved and the reason for the change, it appears that the convict/patient is entitled to the same procedural safeguards and the same protection of his rights as any other person being involuntarily committed to a State mental hospital or other treatment facility. Of course, though, if discharge of a patient of this type from the State mental hospital becomes suitable, notwithstanding the provisions of G.S. 122-58.8 regarding transportation to his county of residence, he should be returned to the penal institution for service of the remainder of his sentence.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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4 October 1973

Subject: Parole; Parole Conditions; Urinalysis

Requested by: Mr. J. Mac Boxley, Chairman
North Carolina Board of Paroles

Questions: (1) Can the North Carolina Board of Paroles legally require a parolee as a condition of parole to submit to urinalysis to determine whether or not he or she has been using drugs?

(2) May a parolee be required to agree, as a condition of his parole, to pay for the urinalysis tests?

(3) If the results of urinalysis are positive as to indicate drug usage, does this constitute legal grounds for revocation of parole?

Conclusions: (1) The North Carolina Board of Paroles may legally require a parolee as a condition of parole to submit to urinalysis to determine whether or not he or she has been using drugs.

(2) A parolee may not be required to agree, as a condition of his parole, to pay for the urinalysis tests.

(3) The results of such urinalysis indicating drug usage would be evidence, and not

grounds in and of itself, that discretionary revocation is justified.

The Legislature has granted to the Board of Paroles broad discretion in regard to both the granting and revocation of parole, G.S. 148-60. The Courts have upheld this grant as constitutional and have regarded rigid guidelines as both unnecessary and undesirable. *Jernigan v. State*, 10 N.C. App. 562, 170 S.E. 2d 788 (1971).

"A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked." *Hinkle v. Ohio Parole Authority*, 419 F. 2d 130 (6th Cir. 1969). "A state prisoner's right to parole is not one of the rights protected by the United States Constitution." *Dunn v. California Department of Correction*, 401 F. 2d 340 (9th Cir. 1968). It therefore follows that a parole may be granted upon such terms and conditions as the granting power may see fit, so long as they are not immoral, illegal, or impossible of performance. 59 Am. Jur. 2d, Pardons and Parole, §83.

A parole is an act of grace and when the inmate accepts the parole, he is bound by all its provisions that are legal, moral and capable of performance. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922). Since parole is intended to be a means of restoring offenders who are thought to be good social risks to society, they are continually under the supervision, guidance and control of the parole authorities. G.S. 148-54; *State v. Rhinehart*, 267 N.C. 470, 148 S.E. 2d 651 (1966); *Jernigan v. State, supra*. Hence, the Board of Paroles can require a parolee to submit to urinalysis as a condition of parole provided that this condition is specified in writing as a part of the parole instrument. G.S. 148-61.

No statute, of which we are aware, requires a prisoner to pay for his medical expenses. On the contrary, G.S. 148-19(a) directs the Department of Correction to prescribe " . . . standards for health services to prisoners which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients." The Commissioner of Mental Health is permitted to detail, at the request of the Commissioner of Correction, personnel employed by the Department of Mental Health to the Department of Correction for the purpose of furnishing and

supervising all types of health services to the Department of Correction. There is also a provision that the compensation, allowances, and expenses of such Department of Health personnel will be reimbursed from appropriations to the Department of Correction. There is a further provision permitting the Commissioner of Correction to make similar arrangements with any other State government agency in order to meet the health needs of Department of Correction prisoners. G.S. 148-19(b).

North Carolina law also provides that all medical care for prisoners confined in local confinement facilities will be provided by government. Emergency medical care for jail prisoners will be provided and paid for by the government of "... the local confinement facility." G.S. 153-53.2(b). In addition, the governing body of any local confinement facility shall provide for a licensed physician responsible for the prisoner's medical services including compensation to the physicians for such medical services. G.S. 153-53.3(a). All local confinement facilities must provide for a thorough physical examination at public expense of all prisoners within forty-eight (48) hours after confinement, G.S. 130-121, and this examination must also be conducted for venereal disease. G.S. 130-97. Certain criminal costs of a trial may be taxed against a defendant, but these are set out in the statute and are "... complete and exclusive and in lieu of any and all other costs and fees, except that witness fees, jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition thereto." G.S. 7A-304. Jail fees are set at three dollars (\$3.00) for each day's confinement or fraction thereof. G.S. 7A-313.

In *State Highway and Public Works Commission v. Cobb*, 215 N.C. 556, 2 S.E. 2d 565 (1939), the State attempted to collect money from a defendant. The State had previously expended this money to recapture and return defendant after his escape from confinement. The Court held that the State could not collect, reasoning that the escape violated no property right, the expenditure was voluntarily made, the money was spent for a public purpose, and there was no common law principle which authorized recovery. Likewise, in *State v. Patterson*, 224 N.C. 471, 31 S.E. 2d 380 (1944), the Court held that expenses of returning a defendant to this State, without extradition, are not chargeable to a defendant as a part of his court costs, since such expenses were not enumerated as reimbursable

under statutory authorization. Therefore, a parolee may not be required to agree, as a condition of his parole, to pay for a urinalysis since the burden of such expenses has been placed upon the government.

A positive result from a urinalysis test indicating drug usage would be evidence, and not grounds in and of itself, to justify revocation of parole. Of course, such analysis could be used to corroborate other evidence that the parolee cannot remain at liberty without violating the conditions of parole.

Robert Morgan, Attorney General
Jacob L. Safron,
Assistant Attorney General
John R. B. Matthis,
Assistant Attorney General

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4 October 1973

Subject: Counties; Commissioners; Furnishing
Ambulance Service Without Remuneration;
N.C.G.S. § 153-9

Requested by: Mr. Joe O. Brewer
Brewer & Bryan, County Attorneys
Wilkes County

Question: Does the Wilkes County Board of County
Commissioners have the legal authority to
furnish ambulance service without
remuneration to all persons in Wilkes
County whose income is derived solely
from Social Security?

Conclusion: The Wilkes County Board of County
Commissioners has the legal authority
pursuant to G.S. 153-9 to furnish
ambulance service without remuneration to

all persons in Wilkes County whose income is derived solely from Social Security.

G.S. 153-9(58) provides, *inter alia*, that " . . . the board of commissioners of any county or any portion thereof is hereby authorized to provide, or cause to be provided, ambulance service and shall have the power to own, operate and maintain ambulances, to provide and to make *reasonable charges* for ambulance services, or to contract with any public or private agency, person, firm, corporation or association, including public and private hospitals, for the rendering of ambulance service." (Emphasis added)

In the area of public services it has been held that the duty not to discriminate in service or rates is a development of "the common law obligation of equal and undiscriminating service." *Public Service Company v. Power Company*, 179 N.C. 18, 101 S.E. 593, reh. dis., 179 N.C. 330, 102 S.E. 625 (1919); *Dale v. Morganton*, 270 N.C. 567, 155 S.E. 2d 136 (1967). The Court in *Public Service Company* held that, " . . . A public service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons." 179 N.C. 330, 333 (1920). The Court further stated by way of *dictum* that since a service was offered to the public at large it must be afforded to all who desire it on an equal basis. That did not mean, the Court added, that the service must be sold to all at the same price but rather that the circumstances of each consumer could be taken into consideration in setting appropriate fees.

Analogously, if Wilkes County proposes to operate an ambulance service for the general *populus* of that county, it cannot discriminate as to the recipients of such service. Moreover, absent justifying reasons, Wilkes County cannot offer its ambulance service at discriminating prices. Surely, the attempt to relieve those residents of Wilkes County whose income is derived solely from Social Security benefits, the majority of whom are in all likelihood elderly, from an additional financial burden, constitutes not only a commendable but a rational basis for the price discrimination in the furnishing of ambulance service. Therefore, we are of the opinion that G.S. 153-9(58) can be construed to contemplate that in certain cases, and for good reason shown therefor, a reasonable charge for ambulance service might be no charge at all.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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9 October 1973

Subject: Mental Health; Involuntary Commitment;
District Court Order to Seek Outpatient
Treatment in Lieu of Commitment;
Requirement for Additional Rehearings on
Need for Commitment

Requested by: Honorable John S. Gardner, District Judge
16th Judicial District

Questions: (1) When the district court judge in an
involuntary commitment proceeding has
directed the individual to seek outpatient
treatment as an alternative to commitment
to a treatment facility, are rehearings
required at succeeding intervals of 90 or
120 days?

(2) In the above situation where outpatient
treatment is directed, if the need for a later
reevaluation of the propriety of
involuntary commitment to a treatment
facility is indicated, is it necessary to
reinstitute new commitment proceedings in
order to achieve this result?

Conclusions: (1) Where the district court judge in an
involuntary commitment proceeding has
directed the individual to seek outpatient
treatment as an alternative to commitment
to a treatment facility, rehearings are not
required at succeeding intervals of 90 or
120 days.

(2) In the above situation where outpatient treatment has been directed, if a later reevaluation of the propriety of involuntary commitment to a treatment facility is indicated, it will be necessary to institute new commitment proceedings in order to secure such result.

The statutory provisions giving rise to these questions are found in G.S. 122-58.6 dealing with the involuntary commitment hearing in the district court, as follows:

"Within five days, or for good cause shown for delay, within 10 days of the date that the person is taken into custody, a district court judge shall hear the case to determine, by reason of the commission of overt acts, whether the person is violent and of imminent danger to himself or others, or is gravely disabled. If the district court judge makes such determination, he shall order the person to be committed to a treatment facility, or, in the alternative, he may order outpatient treatment of the person at a treatment facility . . ."

G.S. 122-58.7 provides that, where involuntary commitment is appropriate, the commitment period will not exceed 90 days without conducting a rehearing into the necessity of continued commitment. This section further provides that each subsequent commitment order after rehearing by the district court judge shall not exceed 120 days. However, these provisions very specifically relate to instances wherein the individual has been committed and, presumably, are premised upon whatever deprivation of personal freedom is involved in this type of commitment. Thus, there is no requirement of and, in fact, no authorization for any additional rehearsings where outpatient treatment has been directed as an alternative to commitment to a treatment facility.

As to the second question posed, it is obvious that many factors could make later inquiry into a given case desirable. Included among these could be change in the family circumstances of the individual, indication of a deterioration in his mental condition, or a failure of the patient to comply with the order directing outpatient

treatment. In any of these events, the language of the involuntary commitment statutes would appear to require the institution of new proceedings in order to determine the propriety of committing the individual concerned to a treatment facility.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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9 October 1973

Subject: Mental Health; Infants and Incompetents;
Age Limitation on Involuntary
Commitment; Voluntary Admission of
Minor to Treatment Facility Upon Parents'
Request

Requested by: Honorable R. G. Frye, Jr.
Magistrate, Moore County

Questions: (1) Is there any minimum age below which
a person may not be involuntarily
committed to a North Carolina treatment
facility under the provisions of Article 5A,
Chapter 122, North Carolina General
Statutes, effective September 1, 1973?

(2) Under the provisions of Article 4,
Chapter 122, North Carolina General
Statutes effective May 23, 1973, can a
minor be voluntarily admitted to a North
Carolina treatment facility upon his
parents' request but without his consent?

Conclusion: (1) There is no minimum age below which
a person may not be involuntarily
committed to a North Carolina treatment
facility under the provisions of Article 5A,

Chapter 122, North Carolina General Statutes, effective September 1, 1973.

(2) Under the provisions of Article 4, Chapter 122, North Carolina General Statutes, effective May 23, 1973, a minor may be voluntarily admitted to a North Carolina treatment facility upon his parents' request but without his consent.

Article 5A of Chapter 122 refers throughout its text to involuntary commitment of a "person" and prescribes the procedures therefor. Nowhere is the age of such a person mentioned and the only definition of this word is found in G.S. 122-58.2(f), as follows:

"(f) The word 'person,' as used in this Article, shall mean the person taken into custody or admitted to a treatment facility."

It is patent that the above language makes no distinction as to the age of the individual concerned. Thus, due to the absence of any statutory limitation on this subject, there is no minimum age below which an individual is exempt from the provisions of Article 5A, Chapter 122.

In evaluating the voluntary commitment statutes in effect prior to May 23, 1973, this Office has issued the opinion that a minor (i.e., a child under the age of 18 years) may be admitted to a North Carolina mental health facility on an admission request signed by his parents, even over his objection. See Opinion of Attorney General to Mr. R. Patterson Webb, General Business Manager, Department of Mental Health, 42 N.C.A.G. 216 (1973). That opinion was premised upon the general common law recognition—as adopted by our courts—of the rights, responsibilities and obligations inherent in and unique to the parent-child relationship. The new voluntary commitment statutes which became effective on May 23, 1973, contain no provisions which lead to a change in this opinion as affecting the voluntary commitment of a minor.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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9 October 1973

Subject: Courts; Juveniles; Mental Health;
Placement of Juveniles in Treatment
Facilities

Requested by: Mr. R. Patterson Webb
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Question: Do Articles 4 and 5A, Chapter 122, North
Carolina General Statutes, revoke the
authority which G.S. 7A-286(6) vests in a
district court judge exercising juvenile
jurisdiction to secure placement of a
juvenile needing residential care and
treatment for mental impairment in an
appropriate facility?

Conclusion: Articles 4 and 5A, Chapter 122, North
Carolina General Statutes, do not revoke
the authority which G.S. 7A-286(6) vests
in a district court judge exercising juvenile
jurisdiction to secure placement of a
juvenile needing residential care and
treatment for mental impairment in an
appropriate facility.

G.S. 7A-286(6) authorizes the juvenile court to cause proper
examination and evaluation to be made of a child whose case is
before it in order to ascertain the need for medical, surgical,
psychiatric or psychological treatment. This section further provides
that:

"If the court finds the child to be in need of evaluation for mental disorder, mental retardation, or other mental impairment, the court may order the area mental health director or local mental health director to arrange an interdisciplinary evaluation of the child and make recommendations to the court. If such evaluation shows the child to be in need of residential care and treatment for mental impairment, the court may cause the mental health director to arrange admission or commit the child to the appropriate state or local facility."

This Office has previously had occasion to interpret the juvenile court authority in this area. See Opinion of the Attorney General to Mr. Ben W. Aiken, General Business Manager, North Carolina Department of Mental Health, 41 N.C.A.G. 637 (1971). However, in view of the changes engrafted on the voluntary and involuntary commitment procedures by the 1973 General Assembly, it is necessary to reevaluate that opinion.

Article 4 (voluntary admissions) and Article 5A (involuntary commitments) provide for admission and commitment, respectively, to a "treatment facility" which is defined in Article 4 as follows:

"The words 'treatment facility,' as used in this Article, shall mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina, and, provided that approval of admission is obtained from the Director of the Inpatient Service, the Psychiatric Training and Research Center at the South Wing of the North Carolina Memorial Hospital at Chapel Hill for admission or commitment to that facility." See G.S. 122-56.2(d). G.S. 122-58.2(h), dealing with involuntary commitments, sets forth substantially the same definition of a "treatment facility".

Review of all pertinent statutes leads ineluctably to several conclusions. First, a North Carolina Center for the Mentally Retarded is included within the definition of "a treatment facility" as set forth in Articles 4 and 5A. Second, Article 4 was designed to provide for a person with a "mental illness". See G.S. 122-56.1, G.S. 122-56.2(a), and G.S. 122-36(c) and (d). Third, Article 5A is intended to provide only for an individual who, due to his mental condition, is dangerous to himself or others or gravely disabled. Fourth, Article 9, Chapter 122, is designed to provide for the admission to a Center for the Mentally Retarded of an individual who falls in the category of being "mentally retarded". See G.S. 122-36(e) for the statutory definition of this term. Fifth, Articles 4 and 9 are couched in terms which import the legislative intent that admission to a treatment facility under either of such Articles will be pursuant to a voluntary application by the individual, his parents, or one acting *in loco parentis*. Sixth, Article 5A was obviously intended as the only method by which an individual meeting the stiff criteria established therein could be committed to the appropriate treatment facility without his consent. Seventh, inasmuch as the 1973 General Assembly revised G.S. 7A-286 but left the provisions of subsection (6) to read as quoted above, this must be interpreted as a renewed expression of legislative intent that the authority vested thereby be exercised in a manner compatible with the provisions of the other referenced statutes dealing with disposition of mentally ill and mentally retarded persons.

As a result of the above factors, it would appear that the juvenile court does retain the authority to utilize the tools made available to it by G.S. 7A-286(6) in order to secure the placement of a juvenile in an appropriate treatment facility where such type of action is warranted. In other words, where the individual demonstrates the serious symptoms described by Article 5A, the court may direct that involuntary commitment proceedings under that Article be instituted and the proceedings then had will conform to the provisions of that Article. Where the problem falls within the description of "mental illness" or "mental retardation", without the aggravating factors required for involuntary commitment (i.e., "dangerous to himself or others or gravely disabled"), the court may direct the appropriate mental health director, in essence acting in the form of *in loco parentis*, to arrange for admission of the juvenile to the proper facility.

Of course, the court's determination that placement of the juvenile in a treatment facility should be made in keeping with the needs of the individual juvenile and the expression of the intent of the General Assembly relative to the basic purpose for which the treatment facility involved has been established. Thus, the problem of the juvenile concerned should truly fall within the statutory definition of "mental illness" or "mentally retarded".

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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9 October 1973

Subject: Social Services; Access to Individual
Income Tax Records Maintained by
Department of Revenue; G.S. 105-259

Requested by: Dr. Renee Westcott, Director
Division of Social Services
Department of Human Resources

Question: May G.S. 105-259 be interpreted so as to
allow the Division of Social Services access
to individual income tax records
maintained by the Department of
Revenue?

Conclusion: G.S. 105-259 may not be interpreted so as
to allow the Division of Social Services
access to individual income tax records
maintained by the Department of Revenue,
absent the specific authorization of the
Governor to the contrary.

G.S. 105-259 provides that, " . . . it shall be unlawful for the
Commissioner of Revenue, any deputy, agent, clerk, other officer,
employee, or former officer or employee, to divulge and make

known in any manner the amount of income, income tax or other taxes, set forth or disclosed in any report or return required under this Subchapter." However, "Nothing in this section shall be construed to prohibit . . . the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; . . ." Accordingly, absent specific authorization of the Governor to the contrary, it would be incumbent upon the Department of Revenue and its personnel not to divulge or make known in any manner to the Division of Social Services the amount of income, income tax or other taxes set forth or disclosed in any individual income tax records or returns.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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9 October 1973

Subject: Social Services; Legal Responsibilities of
the County Directors of Social Services to
Provide Living Arrangements for Patients
Discharged from State Mental Hospitals

Requested by: Dr. Renee Westcott, Director
Division of Social Services
Department of Human Resources

Question: Is the county director of social services
legally responsible for making living
arrangements for a patient in a State
mental hospital who is ready for discharge
but has no relatives or whose relatives are
unable or unwilling to plan for him?

Conclusion: There is no specific legal responsibility
reposed in a county director of social
services to make living arrangements for a
patient discharged from a State mental

hospital who either has no relatives or whose relatives are unable or unwilling to provide a place for him in their home. There is only the general legal responsibility to care for indigent persons in the county pursuant to policies approved by the county board of social services.

G.S. 122-67 which provided, "The sheriff shall first take this (discharged mental) patient to his or her family, or guardian, and if they cannot, or will not, provide a place for such patient in the home the sheriff shall then place this person under the charge of the director of public welfare in the patient's home county.", was repealed by Session Laws 1973, Chapter 726, Section 2, effective September 1, 1973. Those sections currently pertaining to the discharge of both voluntarily and involuntarily committed mental patients from State treatment facilities, G.S. 122-56.3 and G.S. 122-58.8, omit any reference to the legal responsibility of the county director of social services in making living arrangements for a discharged mental patient who has no home or relatives to care for him. Accordingly, the county director of social services is charged only with the general legal duty of caring for all indigent persons located in his county under policies approved by the county board of social services for the various programs of public assistance established by G.S. 108-23, *et seq.*

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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9 October 1973

Subject: Attachment; Constitutional Law; Effect of
Fuentes v. Shevin; G.S. 1-440.1 through
G.S. 1-440.14

Requested by: Mr. Clarence Kluttz, County Attorney
Rowan County

Question:

Does the opinion in *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972) require that the defendant be given an opportunity for a hearing before the clerk or judge issues an order to the sheriff to seize the defendant's property in an attachment proceeding under the provisions of G.S. 1-440.1-1-440.14?

Conclusion:

The *Fuentes* decision does not require that a defendant be given notice and the opportunity for a hearing prior to the issuance by the clerk or judge of an order of attachment pursuant to G.S. 1-440.1-1-440.14.

The United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed. 556, 92 S.Ct. 1983, held the replevin provisions of the Florida and Pennsylvania statutes to be unconstitutional on due process grounds. The Court held in that case that due process requires that notice and a prior opportunity for a hearing be given before the state invokes its power to seize property from a defendant. The question raised is whether *Fuentes* requires the same notice and opportunity for a hearing prior to the issuance by a clerk or judge of an order of attachment pursuant to G.S. 1-440.1 through 1-440.14.

While the *Fuentes* decision dealt specifically only with the replevin statutes (analogous to North Carolina's claim and delivery statute) of Florida and Pennsylvania, it is clear that the language and the logic of that decision is equally applicable to other summary pre-judgment deprivations of property interests including attachment. The Court in *Fuentes* noted that "outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing" and went on to refer to cases in which the Court had allowed attachment of property without prior hearing. (p. 91)

The Court in *Fuentes* stated, however, that:

"There are 'extraordinary situations' that justify

postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U.S., at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." (pp. 90-91)

The Court went on to summarize situations in which it had approved summary seizures, noting its approval in *Owenbey v. Morgan*, 256 U.S. 94, of "attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest." (p. 91) The Court then indicated that under some circumstances a private creditor interest could be brought within the extraordinary or unusual situations exception so as to justify *ex parte* deprivations of property.

"Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. *There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.* But the statutes before us are not 'narrowly drawn to meet such unusual conditions'. *Sniadach v. Family Finance Corporation, supra*, at 339. And no such unusual situation is presented by the facts of these cases." (p. 93) (emphasis supplied)

Thus, the *Fuentes* decision would appear to allow to stand as constitutional a state replevin or attachment statute which is narrowly drawn and which limits the summary deprivation of property to situations in which such deprivation is necessary to establish *in rem* jurisdiction or in which an unusual need for prompt action is presented as in cases in which the creditor can show an

immediate danger that the debtor will conceal or destroy the property in question.

G.S. 1-440.3 provides that attachment may be had only upon the showing of certain circumstances. The statute is as follows:

"In those actions in which attachment may be had under the provisions of G.S. 1-440.2, an order of attachment may be issued when the defendant is

- (1) A nonresident, or
- (2) A foreign corporation, or
- (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
- (4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
 - a. Has departed, or is about to depart, from the State, or
 - b. Keeps himself concealed therein, or
- (5) A person or domestic corporation which, with intent to defraud his or its creditors,
 - a. Has removed, or is about to remove, property from this State, or
 - b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property."

Thus it can readily be seen that the North Carolina attachment statute is narrowly drawn so as to limit the availability of attachment to those cases in which it is necessary in order to establish jurisdiction or those cases in which it can be shown that the debtor has or is about to conceal or remove himself or his property from the State, thereby establishing an extraordinary or unusual situation in which there is a need for prompt action. Thus the North Carolina attachment statute falls within the "extraordinary situations" exception of *Fuentes* and is not rendered unconstitutional by virtue of that decision.

A number of jurisdictions have reviewed state attachment statutes in light of the decision in *Fuentes* and found these statutes to be unconstitutional. These statutes, however, have typically been broad in scope and have not limited attachment to extraordinary or unusual circumstances. Typical of such decisions are *McClellan v. Commercial Credit Corporation*, 350 F.Supp. 1013 (D. R.I. 1972) and *Etheredge v. Bradley*, 502 P. 2d 146 (Alaska 1972). In *McClellan* a three-judge federal court held the Rhode Island attachment statute unconstitutional stating:

"A potential plaintiff wishing to attach the property of a potential defendant need only have his attorney fill out a form writ which is available to attorneys in bulk with the clerk's signature pre-stamped thereon; execute an affidavit; and deliver them to a sheriff or constable for service . . . The attachment procedure can be accomplished before copies of the summons, complaint and writ of attachment are filed with a Rhode Island Court." (p. 1014)

In *Etheredge* the Alaska Supreme Court described their attachment statute and held as follows:

"Similarly, Civil Rule 89 may permit attachments in 'extraordinary situations'. But it is not narrowly drafted to meet such situations, as required by due process. The public and private interest in preventing defendants from transferring property to defraud creditors may justify summary attachments in cases where such activity is imminent. However, Bath made no showing that Etheredge intended to conceal or transfer his property to avoid a possible judgment, since Civil Rule 89 does not require a plaintiff to make such a showing to a judicial official . . . The rule is quite broad in scope, permitting summary attachment of any property not exempt from execution. Moreover, the plaintiff is not required to prove or allege any special circumstances requiring the immediate attachment of the defendant's property." (pp. 153-154)

Similar decisions were reached in *Schneider v. Margossian*, 349 F. Supp. 741 (D Mass. 1972); *Idaho First National Bank v. Rogers*, 41 L.W. 2492 (1973); *Seattle Credit Bureau v. Hibbitt*, 7 Wash. App. 219, 499 P. 2d 92 (1972); *Richman v. Richman*, 72 Misc. 2d 803, 339 N.Y.S. 2d 589 (1973); and *Randone v. Appellate Department*, 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709, (1971), cert. denied, 407 U.S. 924 (1972).

On the other hand, the Louisiana Supreme Court has recently upheld its sequestration statute against a due process challenge based upon *Fuentes*. *W.T. Grant v. Mitchell*, 263 La. 627, 269 So. 2d 186 (1972). In that case the plaintiff under the Louisiana procedure had filed an affidavit stating that he "has reason to fear and believe that the said defendant, Lawrence Mitchell, will encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary . . ." The Louisiana court based its decision in part upon the "extraordinary situations" exception to *Fuentes* as follows:

"The court declared these statutes worked a deprivation of property without due process of law insofar as they denied the right to a prior opportunity to be heard before chattels are taken from the possessor. However, in its reasons the court said, 'there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.'

"This clearly announced exception to the ruling, we feel, exists in the instant case." (p. 190)

Another basis for the United States Supreme Court's ruling in *Fuentes* was the court's finding that:

"The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate

seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The state acts largely in the dark." (p. 93)

The North Carolina attachment statute is also clearly distinguishable from the replevin statutes involved in *Fuentes* in this respect. To obtain an order of attachment in North Carolina the plaintiff must state by affidavit the nature of his action and the ground or grounds under G.S. 1-440.3 under which he is entitled to attachment. In addition, if his ground for attachment is that the defendant has done, or is about to do, any act with the intent to defraud his creditors, the plaintiff must state by affidavit the facts and circumstances supporting such allegation. G.S. 1-440.11. Under G.S. 1-440.12, the clerk or judge issues the order of attachment only if the matters required by G.S. 1-440.11 are shown by affidavit to his satisfaction. Thus, prior to issuing an order of attachment, the clerk or judge must review the plaintiff's affidavit and find that the facts are sufficiently shown to justify the attachment and that attachment is appropriate in the particular case. Under the North Carolina attachment procedure, therefore, an impartial state official does review the basis of the claim and evaluate the need for immediate state action.

Thus, it is concluded that the North Carolina attachment statute is not violative of due process as set forth in the *Fuentes* decision in that the statute is narrowly drawn limiting attachment to extraordinary situations in which attachment is necessary to establish jurisdiction or in which there is a real and immediate danger that the property sought to be attached will be removed, destroyed, or concealed if summary attachment is not granted; and the existence of such extraordinary situation and the need for immediate state action must be shown to the satisfaction of an impartial state official prior to the issuance of an order of attachment. The *Fuentes* decision does not require, therefore, that a defendant be given notice and the opportunity for a hearing prior to the issuance by the clerk or judge of an order of attachment pursuant to G.S. 1-440.1-1-440.14.

Robert Morgan, Attorney General
Donald A. Davis,
Assistant Attorney General

9 October 1973

Subject: Mental Health; Involuntary Commitment;
Veterans Administration Physicians As
Qualified Physicians

Requested by: Mr. R. B. Campbell, Chief Attorney
Veterans Administration

Question: May a Veterans Administration physician not actually licensed in North Carolina be considered as a "qualified physician" under Article 5A, Chapter 122, North Carolina General Statutes, in a situation involving the involuntary commitment of an eligible veteran by a North Carolina court to a Veterans Administration Hospital within North Carolina?

Conclusion: A Veterans Administration physician not actually licensed in North Carolina may be considered as a "qualified physician" under Article 5A, Chapter 122, North Carolina General Statutes, in a situation involving the involuntary commitment of an eligible veteran by a North Carolina court to a Veterans Administration Hospital within North Carolina.

Under the current involuntary commitment statutes, a very important role is played by the "qualified physician"—most notably examination and evaluation of the individual. For purposes of these involuntary commitment proceedings, a "qualified physician" is defined as meaning a medical doctor who is duly licensed by the State of North Carolina to practice medicine. See G.S. 122-36(f) and G.S. 122-58.2(g). Elsewhere in our statutes is found authorization for the involuntary commitment of eligible veterans to Veterans Administration Hospitals within this State for care or treatment. See G.S. 34-16. It appears that the present question has arisen because of the fact that the physicians employed at the Veterans Administration Hospitals are not necessarily individuals

who have been licensed to practice medicine by the State of North Carolina.

Since the ratification of the new involuntary commitment statutes, this Office has had occasion to issue an opinion that eligible veterans may be involuntarily committed by a North Carolina Court to a Veterans Administration Hospital within this State. See opinion of Attorney General to Honorable Hal H. Walker, Chief District Judge, 19th Judicial District, dated 31 July 1973, 43 N.C.A.G. 60. The same rationale which mandated the conclusion in that prior opinion is also relevant here. In other words, the patients involved will fall within the categories prescribed by the North Carolina involuntary commitment statutes, the chief officer of the Veterans Administration Hospital will be vested with the same powers as the head of a similar State facility, the State will retain jurisdiction over personnel committed to the Veterans Administration Hospital and the State laws (including those dealing with patient's rights) will be applicable.

Additionally, the standard of qualification for an appointee as a physician with the Department of Medicine and Surgery in the Veterans Administration is that he must " . . . hold the degree of doctor of medicine or of doctor of osteopathy from a college or university approved by the Administrator, have completed an internship satisfactory to the Administrator, and be licensed to practice medicine, surgery, or osteopathy in a state." 38 U.S.C.A. 4105. Significantly, this standard compares very favorably with the requirements and provisions for licensing of medical doctors within this State. See G.S. 90-9 and G.S. 90-13. Further, in G.S. 90-18(4) the General Assembly specifically excluded physicians employed by or assigned to various agencies of the United States Government. While the Veterans Administration is not singled out as one of these particular agencies, it would appear that the situation of Veterans Administration physicians is identical with that of the other federal agencies so listed.

Included among the declared policies of the General Assembly in ratifying the involuntary commitment statutes was an intent " . . . to establish procedures which promptly respond to the needs of the person". The conclusion here clearly tends to foster that declared policy.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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12 October 1973

Subject: Mental Health; Voluntary Commitment;
Procedures for Commitment of an
Inebriate

Requested by: Dr. N. P. Zarzar
Director, Division of Mental Health
Services
Department of Human Resources

Question: Must the provisions of Article 5A, Chapter 122, North Carolina General Statutes, be followed in involuntary commitment proceedings involving an inebriate as well as in proceedings involving a mentally ill person?

Conclusion: The provisions of Article 5A, Chapter 122, North Carolina General Statutes must be followed in involuntary commitment proceedings involving an inebriate as well as in proceedings involving a mentally ill person.

When identifying the type of individual who may be processed under the involuntary commitment procedures, Article 5A consistently refers to a "person" who is "violent", "of imminent danger to himself or others", or "gravely disabled." In view of the lack of further definitive language in the implementing sections of this Article (G.S. 122-58.3 through G.S. 122-58.8), the proposition has been advanced in some circles that the procedures prescribed are only for use in the case of a mentally ill person as distinguished from an inebriate. See G.S. 122-36(c) and (d) for definitions of these terms.

That such interpretation was not intended by the General Assembly is, however, instantly made clear upon the examination of the contents of G. S. 122-58.1, the touchstone of Article 5A:

"§122-58.1. *Declaration of policy.*—It is the policy of the State to insure that no person shall be committed to a treatment facility unless he is determined to be dangerous to himself or others or gravely disabled. *It is further the policy of the State to insure that the commitment of any person with mental illness or inebriety to a treatment facility will be implemented under conditions that protect the dignity and rights of the person;* to establish procedures which promptly respond to the needs of the person; to encourage the utilization of voluntary admissions to programs and treatment facilities; and to assure that any person admitted to inpatient treatment facilities is discharged as soon as a less restrictive mode of treatment is appropriate."
(Emphasis supplied)

Further indicative of the coverage contemplated for these procedures is the incorporation by reference of the definition of the word "inebriety" found in G. S. 122-58.2(c). As a result, it is patent that the procedures set forth in this Article including the hearings before the courts described are required for involuntary commitment of an inebriate in the same fashion as in the case of a mentally ill person.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

17 October 1973

Subject: Public Officers and Employees; Residence
Requirements; State Highway Patrol

Requested by: Captain Glenn D. Russell
State Highway Patrol

Question: What period of residency in this State is required to be an officer with the North Carolina State Highway Patrol?

Conclusion: No specific period of residency is required.

Prior to the revision of the Constitution of North Carolina, adopted November 3, 1970, a one year residency was required to become an officer with the North Carolina State Highway Patrol. See 40 NCAG, 617, Opinion, LTC Charles B. Pierce, Executive Officer, North Carolina State Highway Patrol, 9 February 1970.

Article VI, Sec. 6 of the Constitution of North Carolina as revised only speaks to elective officers, not appointive officers, and there is no statutory residency for appointive officers other than requiring that they be a resident. Residence (synonymous with domicile) is generally considered as an established place of residence when a person declares an intent to remain and has a permanent dwelling place to which he intends to return when absent. See G.S. 163-57; G.S. 20-6; G.S. 20-7 and G.S. 20-38(26).

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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17 October 1973

Subject: North Carolina Criminal Justice Training and Standards Council; Public Officers; Law Enforcement Officers Employed by the State or Any Agency Thereof are Subject to Chapter 17A.

Requested by: Mr. John Faircloth, Director
N. C. Criminal Justice Training and Standards Council

Question: Are special peace officers appointed for Conservation and Development pursuant to G.S. 113-28.1 and forest rangers appointed pursuant to Article 4, Chapter 113 of the General Statutes, and similar law enforcement officers employed by the State or agencies thereof, who have the power of arrest, subject to the requirements of the North Carolina Criminal Justice Training and Standards Council?

Conclusion: Yes.

G.S. 17A-1 sets forth the findings and policy of the General Assembly as follows:

"The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service."

G.S. 17A-2, entitled "Definitions", provides:

"Unless the context clearly otherwise requires, the following definition applies in this Chapter: 'Criminal justice system' means the State and local law-enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, except constitutional officers."

Although G.S. 17A-2 defines "criminal justice system", that term does not appear at any other place in Chapter 17A, which is entitled

"Law-Enforcement Officers". The term "State and local law-enforcement agencies" is not defined. The words "criminal justice officers" appear numerous times throughout Chapter 17A; thus, when considered with the title of this Chapter, it appears clear that the General Assembly intended for the law-enforcement officers of the State to receive education and training of a professional nature to be administered under the auspices of the Criminal Justice Training and Standards Council.

The General Assembly did not define "law enforcement officer", but its findings and declaration of policy contained in G.S. 17A-1 forcefully express the view that the administration of criminal justice is of Statewide concern, and that the proper administration is important to the health, safety and welfare of the State, and requires the education and training of a professional nature for criminal justice officers. We construe the term "criminal justice officer" to include any law enforcement officer who has the power of arrest conferred upon him by the State of North Carolina.

The words "law enforcement officer" are clearly understood in this State and other jurisdictions to mean those persons who possess the authority of the State to administer and enforce the criminal laws through the exercise of the power of arrest. G.S. 14-288.2 defines law enforcement officer as any officer of the State or any of its political subdivisions authorized to make arrest. See *State v. Grant*, 245 A 2d 528; *Pratt v. State*, 263 A 2d 247.

G.S. 113-28.2 confers the power of arrest on the special peace officers authorized in G.S. 113-28.1 and both G.S. 113-54 and G.S. 113-55 confer upon forest rangers the power of arrest.

The General Assembly could not have reasonably intended that the administration of criminal justice was important to the health, safety and welfare of those citizens arrested by a sheriff or city policemen, but not important to those citizens arrested by the special police officers employed by the State or its agencies. If the proper administration of criminal justice and the education and training of criminal justice officers is of Statewide concern, as declared by the General Assembly, then of necessity all peace officers, police officers, or law enforcement officers must come within the ambit of Chapter 17A of the General Statutes.

A person arrested and deprived of his liberty by a special police officer or a forest ranger has been deprived of his freedom to the same extent and is entitled to the same constitutional rights and safeguards as a person arrested by an agent of the State Bureau of Investigation.

We find no valid reason or argument which would exclude any law enforcement officer employed by the State or any of its agencies from the requirements of education and training contemplated under Chapter 17A.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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17 October 1973

Subject: Social Services; County Participation in
General Assistance Program Optional;
Supplemental Security Income and Public
Law 93-66

Requested by: Dr. Renee Westcott
Director, Division of Social Services
N. C. Department of Human Resources

Questions: (1) Under G.S. 108-62 and 108-65 is
county participation in the General
Assistance Program optional or mandatory?

(2) What significance does Public Law
93-66 have to the State of North Carolina
and, in particular, does Public Law 93-66
in any manner alter the General Assistance
Program so as to make county participation
therein mandatory?

Conclusions: (1) Under G.S. 108-62 and 108-65 county

participation in the General Assistance Program is explicitly optional.

(2) Public Law 93-66 provides, in essence, that a State must assure that no person receiving aid to the aged, blind, and disabled in December 1973 will receive less benefits as of January 1974, the effective date of the federal program of supplemental security income for the aged, blind, and disabled. If this assurance is not incorporated within an agreement between the State of North Carolina and the Secretary of Health, Education, and Welfare by January 1, 1974, the State may lose its eligibility for payments pursuant to Title XIX of the Social Security Act (Medicaid). Public Law 93-66, however, does not and, in fact, could not in any manner alter the General Assistance Program so as to make county participation therein mandatory.

With respect to Question (1), G.S. 108-62 provides:

"Assistance *may* be granted under this Part to persons who would have been eligible under the aid to the aged and disabled category prior to January 1, 1974, but who after such date do not qualify under the Federal Supplemental Security Income Program, including needy spouses, essential persons, certain disabled persons, and those persons needing supplemental payments in boarding homes, rest homes, and convalescent homes for the aged or infirm and those needing attendant care at home. Nothing in this Part should be interpreted so as to preclude any individual county from operating any program of financial assistance using only county funds." (Emphasis added).

In addition, G.S. 108-65 provides, *inter alia*, "...except that no

county shall be granted any allotment from the State General Assistance Fund nor be subject to the provisions of this Part *unless its consent be given* in the manner prescribed by the rules and regulations of the State Board." (Emphasis added).

From the above, it should be obvious that county participation in the General Assistance Program established by the 1973 General Assembly (Chapter 717 of the Session Laws of 1973) is clearly optional. Cf. Opinion of Attorney General to Dr. Renee Westcott, Commissioner, N.C. Department of Social Services, 42 N.C.A.G. 309 (1973), as to extent of the option.

With respect to Question (2), Public Law 92-603 while establishing a new, wholly federal program of Supplemental Security Income (SSI) for the aged, blind, and disabled to commence on January 1, 1974, omitted any provision for benefits for "essential persons." In order to compensate for this omission, the 1973 North Carolina General Assembly enacted a General Assistance Program which, in effect, created a new category of general assistance recipients, i.e., those who would have qualified for State-Federal Aid to the aged and disabled prior to January 1, 1974 but who would no longer qualify under SSI ("essential persons"). As an apparent concession to disgruntled constituents, Congress in July 1973 enacted Public Law 93-66 which partially remedied the omission of Public Law 92-603 by extending benefits to those who were "essential persons" in December 1973.

However, in some states, despite the fact that SSI will now provide funds for those who were "essential persons" in December 1973, many welfare beneficiaries will nonetheless receive a decrease in their total benefits for the rudimentary reason that their former State-Federal benefits were simply more than can be realized under the new federal program of aid to the aged, blind, and disabled. Where this occurs, the State *must* provide supplementary payments to the recipients to raise their amount of benefits up to their pre-SSI level so that no individual will actually receive a decrease in benefits because of the transition from the State-Federal program of aid to the aged, blind, and disabled to SSI. Public Law 93-66, Section 212. Moreover, "In order for any State to be eligible for payments pursuant to Title XIX, with respect to expenditures for any quarter beginning after December 1973, such State must have in effect an

agreement with the Secretary of Health, Education, and Welfare whereby the State will provide to individuals residing in the State (the above mentioned) supplementary payments..." Public Law 93-66, Section 212.

North Carolina, in enacting the new General Assistance Program, did not contemplate the change of coverage effected by Public Law 93-66. In point of fact, the General Assembly merely sought to afford the individual counties of the State an opportunity to extend benefits to a category of recipients which had previously been covered under the State-Federal programs but which would no longer be covered by SSI as of January 1, 1974. Public Law 93-66, however, is not concerned with whether the State or the counties of that State provide for those who are "essential persons" after January 1, 1974, so that the optional feature of the General Assistance Program in this regard is perfectly acceptable. Public Law 93-66 is concerned that no person receiving aid to the aged, blind, and disabled as of December 1973 realizes less benefits in January 1974 simply by virtue of the fact that the federal program pays less total benefits.

Accordingly, if a State is to be eligible for federal Medicaid matching funds, it *must* provide the recipient with the amount by which his total December 1973 aid to aged, blind, and disabled benefits exceed his new total benefits under SSI as of January 1974. The federal law does not look to where this supplementary payment will come, only that every person entitled to it actually receives it. Public Law 93-66 obviously does not mandate county participation in the General Assistance Program, for that is a State internal affair unaffected by any federal law except insofar as non-participation may result in a reduction of total aid to the aged, blind, and disabled benefits realized by a recipient between December 1973 and January 1974. If this result obtains, the State itself will have to take the appropriate corrective measures or stand in peril of losing its eligibility for federal Medicaid matching funds.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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22 October 1973

Subject: Public Officers and Employees; Register of Deeds; G.S. 47-30.1; G.S. 89-10; Land Surveyors

Requested by: Mr. Walter J. Cashwell, Jr.
Scotland County Attorney

Question: In those counties governed by the provisions of G.S. 47-30.1, concerning the registration of plats, is it necessary that a map or plat, which is an integral part of a deed to be recorded, be stamped with the seal of the land surveyor?

Conclusion: No.

Several counties of the State, including Scotland, are governed by the provisions of G.S. 47-30.1 with respect to the registration of a plat. This statute provides as follows:

"In a county to which the provisions of G.S. 47-30 do not apply, any person, firm or corporation owning land may have a plat thereof recorded in the office of the register of deeds if such land or any part thereof is situated in the county, upon proof upon oath by the surveyor making such plat or under whose supervision such plat was made that the same is in all respects correct according to the best of his knowledge and belief and was prepared from an actual survey by him made, or made under his supervision, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, upon the oath of a duly licensed surveyor that said map is in all respects correct according to the best of his knowledge and belief and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked."

G.S. 89-10 provides in pertinent part as follows:

"Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the Board, bearing the registrant's name and the legend, 'registered engineer,' or 'registered land surveyor.' All plans, specifications, plats, and reports issued by a registrant shall be stamped with said seal during the life of a registrant's certificate.. . ."

Although G.S. 89-10 requires plans, specifications, plats and reports issued by a land surveyor to be stamped with his seal, neither G.S. 47-30.1 nor any other statute makes it a condition precedent to the recording of a deed containing a plat that the deed be stamped with the seal of a registered land surveyor.

Robert Morgan, Attorney General
Millard R. Rich, Jr.
Assistant Attorney General

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22 October 1973

Subject: Civil Defense; Preparedness Program
Established by Region L Council of
Governments

Requested by: Mr. David L. Britt
State Coordinator
Department of Military and Veterans
Affairs
Division of Civil Preparedness

Question: May the Region L Council of Governments
establish a Regional Civil Defense
Preparedness Program under authority of
G.S. 166-1 through 166-10;
G.S. 160A-470 through G.S. 160A-478;
and Public Law 85-606 amending Federal
Civil Defense Act of 1950?

Conclusion:

The Region L Council of Governments may not establish a Civil Defense Preparedness Program under authority of G.S. 166-1 through 166-10; G.S. 160A-470 through 160A-478; and Public Law 85-606 amending Federal Civil Defense Act of 1950.

General Statutes 166-2(4) defines a "political subdivision" to "mean counties and incorporated cities and towns." General Statute 166-8 permits each "political subdivision of this State" to establish a local organization for civil defense in accordance with the State Civil Defense Plan and Program. It further provides that each local organization for civil defense will have a director who will be appointed by the governing body of the political subdivision and who shall have direct responsibility for the organization, administration and operation of the local organization for civil defense. It further provides that the counties and municipalities which are by definition political subdivisions are to authorize and make appropriations for purposes outlined in the General Statutes.

Region L Council of Governments is an organization created by the counties of Edgecombe, Halifax, Nash, Northampton and Wilson and several municipalities located within those counties. Its prime purpose is to bring together the area's governmental officials to discuss, study, and adopt cooperative programs to meet common needs. The Board consists of one elected official for each member jurisdiction. At the present time there are twenty-eight (28) members. Although its objectives are commendable, the Region L Council of Governments is not a political subdivision within the meaning of Chapter 166 of the North Carolina General Statutes. Under G.S. 166-8 only political subdivisions of this State are authorized to establish local organizations for civil defense in accordance with the State Civil Defense Plan and Program. The Region L Council of Governments may not then establish a Civil Preparedness Division under authority of the North Carolina General Statutes on Civil Defense Agencies.

Robert Morgan, Attorney General
John R. B. Matthis,
Assistant Attorney General

22 October 1973

Subject: Constitution; Separation of Church and State; Health; Mental Health; Community Pastoral Counseling Program

Requested by: Mr. Patrick Guyton
Planning and Programming
Community Development Specialist
Department of Human Resources

Question: Does an educational program in which clergymen are trained at the expense of the State in total health care counseling in order to offer free counseling services in their communities violate the religious liberty provisions of the First Amendment to the Constitution of the United States, or Article 1, Section 13 of the Constitution of North Carolina?

Conclusion: An educational program in which clergymen are trained at the expense of the State in total health care counseling in order to offer free counseling services in their communities does not violate either the First Amendment to the Constitution of the United States or Article 1, Section 13 of the Constitution of North Carolina.

The First Amendment to the Constitution of the United States provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

Article 1, Section 13 of the Constitution of North Carolina provides: "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience."

Religious liberty, as guaranteed by both the Constitution of the

United States and the Constitution of North Carolina, encompasses two basic principles: the protection of the individual's privileges of freely exercising his religion, and the requirement that no religious rites or institutions be established by the State.

Historically the basis for attacking a statute on the ground that it violates these principles is the assertion that the statute requires an individual to submit to some religious rite or instruction, that it deprives him of or threatens him with the deprivation of freedom for resisting some unconstitutional requirement, or that it deprives him of his property on unconstitutional grounds, such as a direct or indirect tax to support some religious establishment. *In Re Williams*, 269 N.C. 68, 152 S.E. 2nd 317 (1967).

It is also true historically, however, that the states have been permitted to contract for the procurement of supplies or services which may be required for the carrying out of some public purpose, to purchase goods or services from church-related institutions, or to aid those church-related institutions in securing these goods or services for a public purpose. The test for determining whether such an arrangement is constitutional is whether or not the relationship thus created invades or violates the federal or state constitutional provisions relating to the establishment and free exercise of religion. See *Committee for Public Education and Religious Liberty, et al, v. Nyquist*, 93 S. Ct. 2955, _____ U.S. _____, 37 L. Ed. 2nd 948 (1973).

The establishment of a program in North Carolina by which clergymen will be trained in total health care counseling does not invade or violate federal or state constitutional provisions relating to the establishment and free exercise of religion. This program will consist of a two-year training course administered at six educational centers located at different points across the State. While attending the training program, the clergymen will be paid a stipend, in consideration of which they must agree to return to their communities after having completed the program in order to set up community counseling centers. At these counseling centers, residents of the communities can receive health care counseling free of charge.

The purpose of the program is a public one. It will enable a great

many North Carolinians to receive trained counseling in the areas of mental health, physiological health and vocational matters. For practical reasons, most of the counselors in the program will be clergymen, although the counseling will have no connection with any religious organization or offer any religious training. Based on this information, there appears to be no question of a violation of the religious liberty provisions of the federal or State Constitutions.

Robert Morgan, Attorney General
Ann Reed,
Assistant Attorney General

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22 October 1973

Subject: Conservation and Development; Fishing
Laws; Authority of Local Government to
Regulate Fishing in Coastal Fishing Waters

Requested by: Mr. Julian D. Bowman
Chief of Police

Question: May local government ordinances require
permits for certain types of fishing?

Conclusion: The regulation and control of marine and
estuarine resources is exclusively within the
authority of the State of North Carolina,
and local regulations or ordinances
requiring local permits for certain types of
fishing are not authorized under the laws
of North Carolina.

The 1965 North Carolina General Assembly enacted G.S. 113-133, which repealed all special local and private acts and ordinances regulating the conservation of marine and estuarine resources. The statute reads as follows:

"§ 113-133. *Abolition of local coastal fishing laws.* The enjoyment of the marine and estuarine resources of the State belongs to the people of the State as a whole and is not properly the subject of local regulation. As the Department is charged with administering the governing statutes and promulgating regulations in a manner to reconcile as equitably as may be the various competing interests of the people as regards these resources, considering the interests of those whose livelihood depends upon full and wise use of renewable and nonrenewable resources and also the interests of the many whose approach is recreational, all special, local, and private acts and ordinances regulating the conservation of marine and estuarine resources are repealed. Nothing in this section is intended to invalidate local legislation or local ordinances which exercise valid powers over subjects other than the conservation of marine and estuarine resources, even though an incidental effect may consist of an overlapping or conflict of jurisdiction as to some particular provision not essential to the conservation objectives set out in this subchapter."

G.S. 113-133 does not prohibit local ordinances which exercise valid power over subject matters other than conservation of marine and estuarine resources within their jurisdictions. However, a regulation of sports and commercial fishermen prohibiting them from fishing without a local permit would amount to the exercise of authority over the conservation of marine and estuarine resources. (See 41 N.C.A.G. 642)

It further appears that by Regulation B-2(b)(1) of the Board of Conservation and Development the State has chosen to prevent local regulations concerning any prohibition of net fishing from the beaches. This regulation prohibits the use of nets off of Wrightsville Beach from June 15 to August 15.

The regulation and control of marine and estuarine resources is exclusively within the authority of the State of North Carolina, and local regulations or ordinances requiring local permits for certain types of fishing are not authorized under the laws of North Carolina.

Robert Morgan, Attorney General
William A. Raney, Jr.,
Associate Attorney

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24 October 1973

Subject: Courts; Judgments; Prayer for Judgment
Continued; Probation Supervision

Requested by: Honorable L. H. Van Noppen
Chief District Judge
17th Judicial District

Question: Upon entry of "prayer for judgment
continued on payment of the cost and on
the condition that the defendant . . .
(perform certain tasks or refrain from
certain activities)", may the probation
officer treat this as a conviction?

Conclusion: Yes. The probation officer may treat such
action as a conviction.

An inherent, non-statutory power of the court is to continue prayer for judgment, in which the judgment itself is suspended and may be subsequently imposed. When prayer for judgment is continued, there is in effect no judgment of the court, no sentence is given, and no conditions are imposed. When no conditions are imposed, the court has the power to continue prayer for judgment with or without the defendant's consent and no appeal can be had since no final judgment was given. *State v. Griffin*, 246 N.C. 680, 100 S.E. 2d 49 (1957); *State v. Cox*, 215 N.C. 458, 2 S.E. 2d 370 (1939); *State v. Rea*, 257 N.C. 634, 127 S.E. 2d 337 (1962). However, if the court at the time it enters prayer for judgment attempts to impose any conditions amounting to punishment such as a fine or imprisonment, such order is in the nature of a final judgment, and the defendant has the right to appeal. Once a prayer for judgment is given, the court cannot thereafter impose any

additional punishment because it has already exhausted its power, for it cannot punish a person twice for the same offense. *State v. Griffin, supra*, at p. 683; *State v. St. Clair*, 247 N.C. 228, 100 S.E. 2d 493 (1957).

When prayer for judgment is continued, the defendant has been convicted even though there is no final judgment. The probation officer may then consider the offense committed by the defendant, as well as such conviction, as sufficient basis to initiate action to revoke the defendant's probation. A conviction by a court is not a requirement, even though it may be grounds to revoke probation. G.S. 15-200.1. All that is necessary to revoke probation is for the judge, in the exercise of his sound discretion, to find that the defendant has wilfully violated a valid condition of his probation, or that the defendant, without valid excuse, has violated a valid condition upon which the sentence was previously suspended. *State v. Butcher*, 10 N.C. App. 93, 177 S.E. 2d 924 (1970). If a valid condition of probation is that the defendant not be convicted by a court, a probation officer may then treat prayer for judgment continued as a breach of such condition, since it is a conviction even though there is no final judgment. In a hearing to determine if probation should be revoked and a sentence previously suspended should be activated, all that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that a valid condition of the suspended sentence has been violated. *State v. Seagraves*, 266 N.C. 112, 145 S.E. 2d 327 (1965). The fact that there is no appeal from prayer for judgment continued does not prevent the probation officer from treating such action as a conviction.

Robert Morgan, Attorney General
Jacob L. Safron,
John R. B. Matthis,
Assistant Attorneys General

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24 October 1973

Subject: State Departments, Institutions and

Agencies; Board of Transportation;
Secondary Roads; Appropriations; State
Highway Fund

Requested by: Mr. Jack Murdock
Secondary Roads Officer
Department of Transportation and
Highway Safety

Question: Can the State Highway Fund surplus
created in fiscal year 1972-1973 be
allocated for use for highway
improvements on the secondary roads
system in fiscal year 1973-1974?

Conclusion: Yes. Chapter 708 of the 1971 Session
Laws, the Appropriations Act for State
agencies which provides for the surplus,
was amended by Section 23 1/2 of Chapter
507 of the 1973 Session Laws to permit
the allocation by the Governor of the fiscal
year 1972-1973 surplus in this fiscal year
for secondary roads improvements, in
accordance with the provisions of G.S.
136-44.2 and the formula contained in G.S.
136-44.5.

The Secondary Roads Officer for the Department of Transportation and Highway Safety requested an opinion on the use for expenditure on the secondary roads in fiscal year 1974 of the surplus in the Highway Fund created in fiscal year 1972-1973. The 1971 Appropriations Act, Chapter 708 in the 1971 Session Laws, provided that the increase in the Highway Fund over the amount appropriated for the preceding fiscal year could be used in the next succeeding year by the Governor to increase the appropriations of the several categories indicated. Section 23 1/2 of the 1973 Highway Reorganization Act, Chapter 507 of the 1973 Session Laws, amended the provision of the 1971 Appropriations Act relating to the Highway Fund surplus to read as follows:

"In the event receipts and increments in the State

Highway Fund for fiscal year 1972-1973 shall exceed the appropriations made for that fiscal year, such excesses shall be allocated by the Director of the Budget to the Board of Transportation in accordance with the provisions of G.S. 136-17(c)."

G.S. 136-17(c) (which was subsequently recodified as G.S. 136-44.2) provides as follows:

"In the event receipts and increments to the State Highway Fund shall be more than the appropriations made for the preceding fiscal year, such excesses shall be allocated by the Director of the Budget to the Board of Transportation for school and industrial access roads and unforeseen happenings or state of affairs requiring prompt action, with fifty percent (50%) of the balance to be allocated to the State secondary roads program on the basis of need as determined by the Board of Transportation and the remaining fifty percent (50%) to be allocated in accordance with G.S. 136-44.5."

This Office is of the opinion that the increase in the Highway Fund over appropriations for fiscal year 1972-1973, as provided for in the amended 1971 Appropriations Act, may be allocated by the Governor to the Board of Transportation for school and industrial access roads, emergencies, and the secondary roads program as provided in G.S. 136-44.2. Fifty percent of the funds allocated for the secondary roads program shall be allocated on the basis of need as determined by the Board of Transportation and fifty percent shall be allocated in accordance with the formula for secondary road allocations as contained in G.S. 136-44.5.

Section 24 of the Highway Reorganization Act provides that the Act shall become effective on July 1, 1973, but that the provisions of G.S. 136-44.2 and G.S. 136-44.5 shall be first implemented on January 1, 1974, for the following fiscal year. Although there may be some ambiguity in the provisions of Section 23 1/2 and Section 24, it is clear that the Legislature intended for the fiscal year 1972-1973 Highway Fund surplus to be allocated in fiscal year 1973-1974. The authority for allocation of the surplus 1972-1973

fiscal year fund comes from the 1971 Appropriations Act as amended. When the 1971 Appropriations Act, as amended, became effective July 1, 1973, it referred to the provisions in G.S. 136-44.2 for the manner of allocation of the "surplus". The effective date of implementation referred to in Section 24 of the Highway Reorganization Act applies to other matters such as programs and budgets. The implementation of G.S. 136-44.2 and G.S. 136-44.5 referred to in Section 24 of the Highway Reorganization Act has no application to the amended 1971 Appropriations Act.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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24 October 1973

Subject: Guardianship; Forms; Appointment of
Guardian With Authority to Give Consent
for Adoption Under Chapter 48 of the
General Statutes

Requested by: Mrs. Gertrude F. Boone, Supervisor
Adoption Division
Durham County Department of Social
Services

Question: Are Letters of Guardianship which
authorize the fiduciary "to receive and
administer all of the assets belonging to
said estate" sufficient to empower the
guardian to consent to the adoption of the
child under Chapter 48 of the General
Statutes?

Conclusion: The Letters of Guardianship described
above are not sufficient to empower the
guardian to consent to the adoption of the
child under Chapter 48 of the General
Statutes.

The question concerns a document captioned "Letters of Guardianship" on the upper right side of the paper. The words "Letters Of" are printed and the word "Guardianship" is typed in. In the upper left hand corner of the sheet, the words "State of North Carolina, County of Durham, In The Matter Of The Estate Of" followed by the name of the child with the designation "minor" appear. "Durham", the name of the child, and the designation "minor" are typed in. The first paragraph of the document states the jurisdiction of the court, finds the qualifications of the fiduciary to be legally sufficient, and enters an order authorizing the issuance of Letters. Spaces for the name, title and address of the fiduciary and the date of qualification, which are filled in, follow next. The word "Guardian" is typed above the printed words "Title of Fiduciary". The second paragraph of the document reads as follows:

"Said fiduciary is FULLY AUTHORIZED by the laws of North Carolina to receive and administer all of the assets belonging to said estate, and these LETTERS are issued to attest to that authority and to certify that it is now in full force and effect."

Following thereafter is the affixing of the seal of the Superior Court, the printed name of the clerk, and the signature and title of the assistant deputy.

G.S. 48-7 states in part that, except in limited instances, "the parents or surviving parent or guardian of the person must be a party or parties and must give written consent to adoption". G.S. 33-6 states in part that "instead of granting general guardianship to one person, the clerk of superior court may commit the tuition and custody of the person to one and the charge of his estate to another".

The language of the document expressly authorizes the fiduciary "to receive and administer all of the assets". No language in the document refers to "the tuition and custody of the person" of the child. Therefore, the document only purports to and only confers a guardianship of the estate of the child upon the fiduciary. The powers and duties of a guardian of the estate are distinct and separate from those of a guardian of the person. Only a guardian of the person (or, of course, a general guardian) is authorized under Chapter 48 of the General Statutes to consent to the adoption of

the child. A guardian of the estate has no such authority.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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24 October 1973

Subject: Social Services; Suspected Fraudulent
Misrepresentation in Obtaining Public
Assistance; G.S. 108-48; Legal Methods of
Recouping Overpayments In Fraud Cases

Requested by: Dr. Renee Westcott, Director
Division of Social Services
North Carolina Department of Human
Resources

Questions: (1) May a county department of social
services enter into a repayment agreement
with a public assistance recipient suspected
of welfare fraud whereby the recipient
agrees to repay all public assistance funds
fraudulently procured in exchange for
which the county department of social
services agrees not to refer the case to the
district prosecutor?

(2) If the repayment agreement is breached
by the public assistance recipient suspected
of fraud, may the case then be referred to
the district prosecutor for appropriate
disposition?

(3) May recoupment of an overpayment of
public assistance by a reduction in the
monthly grant of the recipient be

continued in cases where the recipient changes assistance categories?

Conclusions:

(1) A county department of social services and a public assistance recipient suspected of welfare fraud may enter into a repayment agreement whereby the recipient agrees to repay all public assistance funds fraudulently procured in exchange for which the county department of social services agrees not to refer the case to the district prosecutor.

(2) If a public assistance recipient breaches an agreement to repay all assistance funds fraudulently procured, the county department of social services may refer the case to the district prosecutor for appropriate disposition.

(3) Recoupment of an overpayment of public assistance by a reduction in the monthly grant of a recipient may be continued in cases where the recipient changes assistance categories.

G.S. 108-48, entitled "*Fraudulent misrepresentation*", provides:

"Any person who wilfully and knowingly, with the intent to deceive, makes a false statement or representation or fails to disclose a material fact in order to enable himself or another person to obtain or to continue to receive assistance to which he is not entitled, is guilty of a misdemeanor, and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court."

With respect to question (1), in a case of suspected welfare fraud, there is no duty, either under State law or under the rules and regulations of the North Carolina Division of Social Services, on the part of the county department of social services or its director to refer the case as a matter of course to the district prosecutor.

In point of fact, the procedure to be followed in cases of suspected recipient fraud is set forth in Section 2213, Volume 2, North Carolina Department of Social Services Welfare Programs Manual wherein it is provided that the county director should present the case with all the evidence and pertinent information available to the county board of social services for consideration. Section 2213 further provides, " . . . In any case where the county board finds that there are unusual circumstances, the board may decide that termination of the recipient's payment or repayment or both will constitute sufficient action . . . " Accordingly, the entry of a public assistance recipient suspected of welfare fraud and a county department of social services into a repayment agreement is clearly a sanctioned procedure in those cases involving "unusual circumstances".

With respect to question number (2), if the public recipient suspected of welfare fraud breaches the repayment agreement, the county department of social services is obviously freed of its obligation not to refer the case to the district prosecutor. Of course, the breach of the repayment agreement *per se* would be of no consequence to the district prosecutor since this was simply a private arrangement entered into between the county department of social services and the recipient suspected of fraud in order to obviate court action. The prosecutor would be concerned only with whether the actions of the recipient suspected of fraud fell within the proscriptions of G.S. 108-48. If they did, he would be guilty of a misdemeanor.

With respect to question number (3), the federal regulation pertaining to recoupment of overpayments, 45 C.F.R. §233.20 (a) (12)(i), specifically allows the State to recoup from available income and resources or from current assistance payments or from both. However, according to the federal regulation, "If the recoupments are made from current assistance payments, the State shall establish reasonable limits on the proportion of such payments that may be deducted, so as not to cause undue hardships on recipients." Section 2214, Volume 2, North Carolina Department of Social Services Welfare Programs Manual providing for the recovery of overpayments to recipients where there is clear evidence that a recipient wilfully withheld information about his income or resources is plainly in accord with the above federal regulation.

Both the Division of Social Services regulation and the federal regulation mandate an objective evaluation of the recipient's resources, needs, ability to repay, etc., so that the repayment does not cause any undue hardship. Consequently, a repayment of an overpayment of public assistance may be effected by a reduction in the monthly grant, even in those cases where the recipient changes assistance categories, so long as such reduction does not work an undue hardship on the recipient.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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24 October 1973

Subject: Licenses and Licensing; Real Estate
Licensing Board; Applicability of Act to
Certain State Employees and Chambers of
Commerce Employees

Requested by: Mr. Albert H. Calloway
Commerce and Industry Division
Department of Natural and Economic
Resources

Question: Are employees of the North Carolina
Department of Natural and Economic
Resources, Division of Commerce and
Industry, and employees of local Chambers
of Commerce required to secure a real
estate broker's or salesman's license in
order to show property to industrial
prospects, to develop information on
industrial sites and to maintain and
disseminate such information?

Conclusion: No.

G.S. 93A-2 is as follows:

"(a) A real estate broker within the meaning of this chapter is any person, partnership, association, or corporation, who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereof, for others.

"(b) The term real estate salesman within the meaning of this chapter shall mean and include any person who under the supervision of a real estate broker, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions set out or comprehended by the foregoing definition of real estate broker."

This opinion is based on the assertion that all employees of the Division of Commerce and Industry and all employees of local Chambers of Commerce who show property to industrial prospects, develop and maintain information on industrial sites and disseminate such information upon requests, receive no commissions, directly or indirectly, from their activities and that no part of their compensation is based directly, or indirectly, on such activity. Their total compensation is a predetermined weekly or monthly salary.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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26 October 1973

Subject: State Departments, Institutions and Agencies; Department of Youth Development; Debiting a Student's Trust Fund for Property Damages Allegedly Caused by the Student

Requested by: Mr. James Peeler Smith,
Senior Administrative Assistant
Department of Social Rehabilitation and Control

Question: May the Department of Youth Development debit a student's trust fund for property damages allegedly caused by the student?

Conclusion: The Department of Youth Development may not debit a student's trust fund for property damages allegedly caused by the student.

A student's trust fund is an account maintained for the deposit of any funds belonging to a child under the supervision of the Department of Youth Development. The account may consist of monies given to the child by his family, earned by him, or otherwise acquired by him. The child may range in age from 9 years to 17 years old. The damaged property is generally property of Youth Development.

"An infant (a person under eighteen years of age) is liable for his torts." *Morris Plan Co. v. Palmer*, 185 N.C. 109, 111, 116 S.E. 261 (1923). The Fourteenth Amendment to the United States Constitution provides in part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law." The Constitution and statutes of the State of North Carolina provide for one form of action for the redress of private wrongs which is designated a civil action. Furthermore, G.S. 1A-1, Rule 17(b)(2), Rules of Civil Procedure, requires that an infant who is a defendant in an action or special proceeding be represented by a general or

testamentary guardian or a guardian ad litem. An informal hearing by the Department to establish the facts and the subsequent debiting of the student's trust fund is contrary to the Fourteenth Amendment of the Constitution of the United States and the Constitution and laws of the State of North Carolina.

A contractual agreement between the Department and the child would be ineffectual to sustain the validity of this procedure. "An infant's contract, unless for 'necessaries' or unless authorized by statute, is voidable by the infant, at his election, and may be disaffirmed during infancy or upon attaining the age of (eighteen)." *Personnel Corporation v. Rogers*, 276 N.C. 279, 282, 172 S.E. 2d 19 (1970).

Therefore, although the child is liable for his torts, this procedure for recovering damages is legally untenable and a contractual agreement with the child concerning debiting the trust fund would be voidable by him. It is the opinion of this Office that the proper method for recovering compensation for property damaged by a child under the supervision of the Department, absent voluntary payment by the child, is the commencement of a civil action by the Department or the owner of the property.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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31 October 1973

Subject: State Departments, Institutions and
Agencies; Department of Administration;
State Land Fund

Requested by: Mr. William L. Bondurant,
Director of Administration

Question: May monies in the State Land Fund be
used for salaries of personnel engaged in

acquisition, inventory, management and disposition of State lands?

Conclusion: Yes.

G.S. 146-67 provides:

*"Governor to employ persons.--*The Governor may employ persons to perform such services as may be necessary to carry out the provisions of this chapter, and he shall fix the compensation to be paid for such services. All expenditures for such services shall be paid from the State Land Fund on order of the Director of the Budget, or the officer designated by him to issue such orders. (1959, c.683,s.1.)"

Authority for acquisition, inventory, management and disposition of State lands is contained in earlier provisions of Chapter 146.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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30 October 1973

Subject: Social Services; Mental Institutions; Legal Residence of Patients in Centers for Mentally Retarded

Requested by: Dr. Renee Westcott, Director
Division of Social Services
North Carolina Department of Human Resources

Question: A 23-year-old patient in a center for mentally retarded was placed in the center at age 10 by his mother who then resided in A county, but the mother has since

established residence in B county. Upon the currently proposed release of this patient and his placement in a nursing home, what county will be considered his county of legal residence for social services purposes?

Conclusion:

If the patient's mother established residence in B county during the patient's minority, B county will be his county of legal residence for social services purposes; if the mother's change of residence occurred after the patient attained majority, A county will be his county of legal residence for these purposes.

This Office has previously addressed similar questions in this general area. See Opinion of Attorney General to Mr. Joe Freeman Britt, Robeson County Attorney, 41 N.C.A.G. 197 (1971); Opinion of Attorney General to Mrs. Bing Lau, Social Worker, Murdoch Center, 41 N.C.A.G. 472 (1971). However, those opinions were antecedent to legislation on this subject ratified by the 1973 General Assembly. Thus, it is necessary to examine this latest enactment by the General Assembly in order to answer the question posed.

The self-pronounced purpose of this legislation, which has taken the form of G.S. 153A-257, is to make legal residence in a county determinative of a county's responsibility for financial support and other required social services. The rules established by this section, as affecting the question posed here, are as follows:

"(a) . . . Legal residence in a county is determined as follows:

- (1) Except as modified below, a person has legal residence in the county in which he resides.
- (2) If a person is in a hospital, mental institution, nursing home, boarding home, confinement facility, or similar institution

or facility, he does not, solely because of that fact, have legal residence in the county in which the institution or facility is located.

- (3) A minor has the legal residence of the parent or other relative with whom he resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, he has the legal residence of the person with whom he resides. *Any other minor has the legal residence of his mother, or if her residence is not known then the legal residence of his father;* if his mother's or father's residence is not known, the minor is a legal resident of the county in which he is found.

(b) *A legal residence continues until a new one is acquired, either within or outside this State. When a new legal residence is acquired, all former legal residences terminate.*" (Emphasis supplied)

Literal reading of the clear provisions of the new statute as extracted above requires a conclusion similar in nature to the conclusions arrived at under the prior North Carolina Statutes. See 41 N.C.A.G. 197 (1971) and 41 N.C.A.G. 472 (1971), both *supra*.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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31 October 1973

Subject: Mental Health; Consent to Medical Treatment in North Carolina Mental Hospitals; Appointment of Guardian; Electroshock Therapy in Voluntary Admission and Involuntary Commitment Cases

Requested by: Mr. R. Patterson Webb,
Assistant Director for Administration
Division of Mental Health Services
North Carolina Department of Human Resources

Questions: (1) When electroshock therapy or similar treatment is medically appropriate, may the superintendent of a North Carolina mental hospital on his own initiative issue and send to the Clerk of the Superior Court a certificate declaring a patient in the mental hospital to be of insane mind and memory or mentally retarded?

(2) When electroshock therapy or similar treatment is medically appropriate, is the authority of the superintendent of a North Carolina mental hospital to issue and send to the Clerk of the Superior Court a certificate declaring a patient in the mental hospital to be of insane mind and memory or mentally retarded the same for a patient who was voluntarily admitted as it is for one who has been involuntarily committed?

Conclusions: (1) When electroshock therapy or similar treatment is medically appropriate, the superintendent of a North Carolina mental hospital may on his own initiative issue and send to the Clerk of the Superior Court

a certificate declaring a patient in the mental hospital to be of insane mind and memory or mentally retarded.

(2) When electroshock therapy or similar treatment is medically appropriate, the authority of the superintendent of a North Carolina mental hospital to issue and send to the Clerk of the Superior Court a certificate declaring a patient in the mental hospital to be of insane mind and memory or mentally retarded is the same for a patient who was voluntarily admitted as it is for one who was involuntarily committed.

G.S. 122-55.6, which represents the codification of a portion of the "Patients' Rights Bill" ratified by the 1973 General Assembly, deals with the right to treatment of each institutionalized patient in treatment facilities (including mental hospitals) operated by the State of North Carolina. In addition to providing an affirmative right to treatment, this section contains the following language designed to insure that appropriate consent is obtained prior to subjecting the individual patient to controversial or experimental types of therapy:

" . . . Treatment involving electroshock therapy, the use of experimental drugs or procedures, or surgery, other than emergency surgery, shall not be given without the express and informed written consent of the patient if patently competent, otherwise of the patient and guardian as hereinafter defined, unless the patient has been adjudicated an incompetent under Chapter 35 of the General Statutes and has not been restored to legal capacity, in which case express and informed written consent of his guardian or trustee appointed pursuant to Chapter 35 of the General Statutes must be obtained . . . "

Elsewhere in the Patients' Rights Bill, the following definitive language is included:

"The word 'guardian,' unless otherwise restricted or defined herein, shall mean and include

- (1) A court-appointed general or testamentary guardian of the person of the patient,
- (2) The natural parent or other person *in loco parentis* in the case of an infant patient, or if (1) and (2) not applicable,
- (3) A spouse, parent, brother, sister, or other relative or friend if designated 'closest relative' by the patient at the time of his admission; provided, however, that the word 'guardian' shall not mean or include a person who files an affidavit or testifies in a proceeding in favor of involuntary commitment of the patient."

The present questions are designed to seek clarification of the effect of the quoted provisions of the Patients' Rights Bill upon G.S. 35-3. That section deals, *inter alia*, with any person who "is confined in any State, territorial or governmental asylum or hospital for the insane in this State". It authorizes the superintendent of such a hospital to issue a sworn certificate declaring a patient therein to be of insane mind and memory or mentally retarded, and provides that this certificate shall be sufficient evidence to authorize the Clerk to appoint a guardian for such patient. Nowhere in G.S. 35-3 are to be found any restrictions on the superintendent of the mental hospital for instituting such a certificate on his own initiative. Of course, the issuance of such a certificate by the superintendent would be limited to those situations where there is no "guardian" as defined by the Patients' Rights Bill.

In describing the type of patients for whom the superintendent may issue this certificate, G.S. 35-3 refers to "any person" who is "confined" in the hospital. In view of the current statutes which provide for "voluntary admission" and "involuntary commitment", the word "confined" is singularly uninformative. However, it is clear

that, at the time the legislators ratified G.S. 35-3, they intended it to apply to patients in the North Carolina mental hospitals. It must be recognized that the treatment involved--though possibly of a controversial nature--would be designed to improve the patient's condition and would be reserved for situations requiring such as a vital part of necessary therapy. Thus, it would be ludicrous to assume that it would be intended that a patient who was involuntarily committed could be the beneficiary of this type of curative treatment while one who has been voluntarily admitted would have no such entitlement. In fact, any discrimination between the two types of patients with regard to necessary treatment procedures would be unrealistic and unconscionable.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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31 October 1973

Subject: Licenses and Licensing; North Carolina Pesticide Board; Public Officers and Employees; G.S. 143-434, et seq; Licensing of Certain Employees of North Carolina State University as Pesticide Operators and Consultants

Requested by: Mr. William B. Buffaloe, Secretary
North Carolina Pesticide Board

Questions: Under the provisions of the North Carolina Pesticide Law of 1971,

(1) Are extension specialists employed by North Carolina State University required to be licensed as pesticide applicators and pesticide consultants?

(2) Are county extension agents required to be licensed as pesticide applicators and pesticide consultants?

(3) Do University personnel who apply pesticides to land owned by the University have to be licensed as pesticide applicators?

Conclusions:

(1) Extension specialists must be licensed as pesticide applicators but not as consultants.

(2) County extension agents who apply pesticides under the supervision of a licensed pesticide applicator need not be licensed as pesticide applicators. Such agents are not required to be licensed as pesticide consultants.

(3) Yes, unless they are working under the supervision of a licensed pesticide applicator, in which event they are not required to be licensed.

For the purposes of this opinion, the following definitions from the North Carolina Pesticide Law of 1971, §143-460, (Article 52, Chapter 143 of the General Statutes) are pertinent:

"(27) 'Pest control consultant' means any person who, for a fee, offers or supplies technical advice, supervision, or aid, or recommends the use of specific pesticides for the purpose of controlling insects, plant diseases, weeds, and other pests, but does not include any person regulated by the North Carolina Structural Pest Control Act (G.S. Ch. 106, Art. 4C).

* * * *

"(29) 'Pesticide applicator' means any person who owns or manages a pesticide application business which is engaged in the business of applying pesticides upon

the lands of another. *It includes public operators, but does not include:*

"a. Any person applying pesticides for himself with ground equipment who

1. Operates and maintains pesticide applicator equipment primarily for his own use;
2. Is not regularly engaged in the business of applying pesticides for hire amounting to a principal or regular occupation;
3. Does not publicly hold himself out as a pesticide applicator; and
4. Operates his pesticide applicator equipment only in the vicinity of his own property and for the accommodation of his neighbors.

"b. Any person regulated by the North Carolina Structural Pest Control Law (G.S. Ch. 106, Art. 4C).

* * * *

"(33) 'Public operator' means any person in charge of any equipment used by public utilities (as defined by General Statutes Chapter 62), *state agencies, municipal corporations, or other governmental agencies applying pesticides.*" (Emphasis added)

The professional duties and activities of North Carolina State University herein involved were discussed in a presentation made to the Pesticide Board on September 27, 1973, by T. C. Blalock, Associate Director, North Carolina Agricultural Extension Service. These remarks were, in pertinent part, as follows:

"A large number of our specialists--perhaps as many as 50--are involved in conducting field research or

demonstrations with pesticides or in making recommendations included in the North Carolina Agricultural Chemicals Manual on the use and application of pesticides. In this capacity they, or employees under their supervision, may at times apply pesticides on small plots on privately owned land. The same would be true for some research faculty in the School of Agriculture and Life Sciences

"While it is true that our County Agents are involved in much of the field research or demonstration work of the specialists most of the actual application of the pesticides is done either by the specialist's technicians or by the farmer on whose land the plot is located"

Dr. Blalock's remarks indicate that county agents occasionally apply pesticides on privately owned farms.

At the May 18, 1972, meeting of the Pesticide Board, the activities and duties of extension specialists and county agents were explained by Dr. G. T. Weekman of North Carolina State University. His remarks in pertinent part were as follows:

"Traditional extension techniques are augmented by use of applied research techniques to help farmers solve their problems. Consequently, specialists apply some pesticides in experimental or demonstrational plot work as a means of collecting additional information and training agents, agribusiness groups and farmers

"State level specialists in the three disciplines of Weed Science, Plant Pathology and Entomology are most heavily involved with pesticide usage and from time to time in the normal course of their duties are expected to evaluate and implement improved pesticide practices. They may as the need arises be in charge of pesticide application equipment to apply or supervise the application of limited amounts of pesticides to demonstrate efficacy in problem

situations or to obtain performance data from small replicated plots prior to issuing pest control recommendations

"Approximately 350 county agricultural agents are administratively housed in 100 county offices and the Cherokee Indian Reservation. Each county agricultural agent is assigned specific commodity responsibilities in his county or in a few cases, his geographic area of activity

"The county agricultural agents, unlike state level specialists, have broad subject matter responsibilities such as livestock production, field crop production and horticultural crop production. From time to time county agricultural agents supervise equipment on the farm of a cooperator during the application of registered pesticides in demonstrating pest control techniques in their locale of responsibility. Generally these demonstrations have been designed and planned by state level specialists. In addition, these same agents may assist the previously described state level specialists in conducting demonstrations and applied research "

By the plain and unequivocal language of G.S. 143-460 (29), the term "pesticide applicator" includes "public operators" as defined in G.S. 143-460 (33). North Carolina State University is clearly a "state agency" and "governmental agency" as used in G.S. 143-460 (33). Its employees thus are pesticide applicators. Pesticide applicators are required to be licensed by G.S. 143-452.

It is argued that it was the intent of the General Assembly to exclude all University employees from the provisions of the Pesticide Law of 1971 when such employees are engaged in their official duties. The North Carolina Supreme Court has held on many occasions that a statute must be construed as written. See *State v. Wiggins*, 272 N.C. 147, 158 S.E. 2d 37; *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712; *Claim of Duckett*, 271 N.C. 430, 156 S.E. 2d 838.

"Where the language of a statute is clear and

unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." Strong, N.C. Index 2d, Statutes, sec. 5.

Both extension specialists and county extension agents, when applying pesticides on private lands, must be licensed as pesticide applicators, unless the county agent is being supervised by a licensed pesticide applicator.

Pesticide consultants need be licensed only when they receive a "fee". See G.S. 143-460 (27). Extension specialists and county agents, when acting as "consultants", as defined in the Act, receive only their regular salary and are thus not required to be licensed.

With respect to Question (3), while the Act exempts from the licensing requirements a person applying pesticides "for himself", (see G.S. 143-460 (29)a.1.), it does not exempt public operators. Therefore, all University employees applying pesticides on University lands must be licensed as pesticide applicators or work under the supervision of a licensed applicator.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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2 November 1973

Subject: Public Officers and Employees; Courts;
Clerk of Superior Court; Weapons; G.S.
143-63.1; Disposition of Confiscated
Weapons in Halifax, Perquimans,
Rockingham and Warren Counties

Requested by: Mr. J. C. Taylor, Clerk of Superior Court
Halifax County

Question: In those counties (Halifax, Perquimans, Rockingham and Warren) in which the Clerk of Superior Court has authority to dispose of certain confiscated weapons, has such authority been affected by the enactment of Chapter 666 of the 1973 Session Laws, codified as G.S. 143-63.1?

Conclusion: Yes. Chapter 666 of the 1973 Session Laws repealed the authority of the Clerk of Superior Court in the four counties in question to sell or otherwise dispose of any weapon described in the act.

In Halifax, Perquimans, Rockingham and Warren Counties, the Clerk of Superior Court has certain authority with respect to the disposition of confiscated weapons. (For a discussion of how this authority evolved, see the Editor's Note following G.S. 14-269.1 in Volume 1B of the General Statutes.)

Chapter 666, Sections 1-3, of the 1973 Session Laws, codified as G.S. 143-63.1, provides:

"§143-63.1. *Sale, disposal and destruction of firearms.*—

(a) Except as hereinafter provided, it shall be unlawful for any employee, officer or official of the State in the exercise of his official duty to sell or otherwise dispose of any pistol, revolver, shotgun or rifle to any person, firm, corporation, county or local governmental unit, law-enforcement agency, or other legal entity.

"(b) It shall be lawful for the Purchase and Contract Division of the Department of Administration, in the exercise of its official duty, to sell any weapon described in subsection (a) hereof, to any county or local governmental unit law-enforcement agency in the State; provided, however, that such law-enforcement agency files a written statement, duly notarized, with the seller of said weapon certifying that such weapon

is needed in law enforcement by such law-enforcement agency.

"(c) All weapons described in subsection (a) hereof which are not sold as herein provided within one year of being declared surplus property, shall be destroyed by the Purchase and Contract Division of the Department of Administration."

Clerks of Superior Court are full-time employees of the State. G.S. 7A-101. Chapter 666 does not exempt any State employee from its provisions.

"A statute must be construed as written. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." Strong's N. C. Index 2d, Statutes, Sec. 5, citing cases.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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2 November 1973

Subject:	Mental Health; Involuntary Commitment; Effect of Court Order Directing Voluntary Admission
Requested by:	Peter H. Holden, M.D. Assistant Superintendent Dorothea Dix Hospital
Question:	Does an order of the district court judge in an involuntary commitment rehearing directing that a patient be voluntarily

committed to a treatment facility until cured or until the patient desires to leave preclude appropriate personnel at the treatment facility from discharging the patient in the same fashion as other voluntarily admitted patients?

Conclusion:

An order of the district court judge in an involuntary commitment rehearing directing that a patient be voluntarily committed to a treatment facility until cured or until the patient desires to leave does not preclude the appropriate personnel at the treatment facility from discharging the patient in the same fashion as other voluntarily admitted patients.

A long-term patient at a North Carolina treatment facility was originally involuntarily committed under the prior statute authorizing such action. The rehearing was one of the type periodically required under the provisions of G.S. 122-58.7, effective September 1, 1973. In his order, the district court judge found that the patient needed further treatment for her mental condition, that she desired and voluntarily assented to remain at the treatment facility, and that the desires and the voluntary consent of the patient were in the best interest of the State and society. The order then specified that the patient be voluntarily admitted to the treatment facility for further mental treatment and that she be treated and remain at the treatment facility until she is cured or until she voluntarily desired to leave, referring to G.S. 122-56.3(a) as authority.

As enacted by the 1973 General Assembly, Articles 4 and 5A (dealing with voluntary admissions and involuntary commitments, respectively) of Chapter 122 furnish the statutory guidelines within which this order must be interpreted.

Initially, of great importance is the declaration of policy relative to involuntary commitments under Article 5A, as found in G.S. 122-58.1 that:

"It is further the policy of the State . . . to encourage the utilization of voluntary admissions to programs and treatment facilities; and to assure that any person admitted to inpatient treatment facilities is discharged as soon as a less restrictive mode of treatment is appropriate."

Examination of the standards governing voluntary admissions as compared to those required for involuntary commitments reveals that much less justification is required for utilizing the former method for entry into a treatment facility. Thus, it might well be that the action of the court was predicated upon a feeling that this particular individual does not truly meet the standards of Article 5A so as to justify involuntary commitment. In any event, the declaration of policy quoted above together with the court's finding that the patient desires to apply for voluntary admission removes any doubt as to the legality of the order directing processing of the case in that way.

On the other hand, this order would not require the treatment facility to retain this patient at the facility *ad infinitum*. Article 4 does not specifically provide for discharge (absent the patient's request) of a person at such time as he or she may be "cured". Nevertheless, the following language from G.S. 122-56.3(a) would appear to be apropos:

"If the evaluating physician or physicians shall determine that the person is not in need of treatment or further psychiatric evaluation *by the treatment facility*, the person shall not be accepted as a patient."
(Emphasis added)

The provisions of G.S. 122-56.3(a) would appear to apply to all situations wherein the appropriate treatment facility authorities have determined that further institutionalization of a voluntarily admitted patient is not necessary or desirable as a part of the patient's therapy. This would appear to be true whether the qualified professional personnel at the treatment facility feel that outright discharge is in order or that discharge to a less restrictive mode of treatment--such as that found in a boarding home--is appropriate.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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6 November 1973

Subject: Social Services; Interpretation of General Assistance Program; G.S. 108-62

Requested by: Dr. Renee Westcott, Director
Division of Social Services
Department of Human Resources

Questions: (1) Does the General Assistance Program, G.S. 108-62, allow for a supplemental payment to a public assistance recipient residing in a multiple household whose income is less in January 1974 than in December 1973 as a result of the conversion to the federal program of Supplemental Security Income for the aged, blind, and disabled?

(2) Does the General Assistance Program, G.S. 108-62, allow for a supplemental payment to a former public assistance recipient who resides in domiciliary care facilities but whose income makes him ineligible for the Supplemental Security Income program effective January 1, 1974?

Conclusions: (1) The General Assistance Program, G.S. 108-62, allows for a supplemental payment to a public assistance recipient residing in a multiple household whose income is less in January 1974 than in December 1973 as a result of the conversion to the federal

program of Supplemental Security Income for the aged, blind and disabled.

(2) The General Assistance Program, G.S. 108-62, allows for a supplemental payment to a former public assistance recipient who resides in domiciliary care facilities but whose income makes him ineligible for the Supplemental Security Income program effective January 1, 1974.

With respect to Question Number (1), G.S. 108-62 provides:

"Assistance may be granted under this Part to persons who would have been eligible under the aid to the aged and disabled category prior to January 1, 1974, but who after such date do not qualify under the Federal Supplemental Security Program, including needy spouses, essential persons, certain disabled persons, and those persons needing supplemental payments in boarding homes, rest homes, and convalescent homes for the aged or infirm and those needing attendant care at home. Nothing in this Part should be interpreted so as to preclude any individual county from operating any program of financial assistance using only county funds."

Any discussion of the current General Assistance Program, G.S. 108-62, *et seq.*, should first recognize that with the enactment of Public Law 93-66, G.S. 108-62 became, in essence, somewhat outmoded. The General Assistance Program established by the 1973 North Carolina General Assembly was intended to provide public assistance coverage to those who would have qualified for State-Federal Aid to the Aged and Disabled prior to January 1, 1974, but who would no longer qualify under the Federal Supplemental Security Income Program, i.e., "essential persons". However, in July 1973 Congress enacted Public Law 93-66 which extends benefits to those who were "essential persons" in December 1973. Moreover, this Public Law provides that a state must assure that no person receiving Aid to the Aged, Blind, and Disabled in December 1973 will receive less benefits as of January 1974, the date of implementation of the federal program of Supplemental

Security Income, or otherwise stand in jeopardy of losing eligibility for payments pursuant to Title XIX of the Social Security Act (Medicaid).

Thus, it is glaringly apparent that the original purpose of the new General Assistance Program was substantially mooted by Public Law 93-66 and that, in addition, a new demand was imposed upon the Program by the federal enactment, i.e., the provision of supplementary payments to assure that no person in North Carolina receiving Aid to the Aged and Disabled as of December 1973 will realize less benefits in January 1974 because of the conversion to the Supplemental Security Income Program. See Opinion of Attorney General to Dr. Renee Westcott, dated October 17, 1973.

In any event, since it is now generally acknowledged that the General Assistance Program will have to provide the aforementioned supplementary payments, it is our opinion that, if at all possible, G.S. 108-62 must be construed in accordance with the requirements of Public Law 93-66. Accordingly, since there are no words of limitation in the language of G.S. 108-62, we are of the belief that a public assistance recipient residing in a multiple household, who may receive more income in December 1973 than the amount for which he is eligible when converted to the Supplemental Security Income Program in January 1974, is indeed within the coverage of G.S. 108-62 although not specifically enumerated.

With respect to Question Number (2), Public Law 93-66 will have no significance as the recipient would be ineligible for the Supplemental Security Income Program. Nevertheless, G.S. 108-62 does expressly address the problem of those persons needing supplemental payments for domiciliary care who, although eligible for assistance under the Aid to the Aged and Disabled category prior to January 1, 1974, do not qualify under the Federal Supplemental Security Income Program.

As stated above, the original intention of the General Assistance Program, G.S. 108-62, was to provide coverage for those who *would have received benefits before* the implementation of the Federal Supplemental Security Income Program. This intention, then, would obviously be satisfied in the case of a public assistance recipient in December 1973 receiving assistance payments to meet the

difference in his income and the cost of domiciliary care, who would become ineligible for the Supplemental Security Income Program in January 1974.

Accordingly, we are of the opinion that the General Assistance Program does allow for a supplemental payment to a former public assistance recipient residing in domiciliary care facilities whose income makes him ineligible for the Supplemental Security Income Program on January 1, 1974.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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6 November 1973

Subject: Public Contracts; Architects and Engineers;
Additional Payment to Architect for
Services Due to Extended Time of
Completion

Requested by: Mr. Carroll L. Mann, Jr.
State Property Control and Construction
Officer

Question: Where a contractor exceeds the time specified in his contract for completion of the work, but the Secretary of Administration does not assess liquidated damages for some reason; and where the contract between the architect and owner provides that additional payments to the architect shall not exceed the amount of liquidated damages, can the owner pay to the architect any amount for additional services provided by reason of the extended time of completion of the contract?

Conclusion:

Under the express terms of the agreement entered into by the architect, he is not entitled to be paid more than the amount of liquidated damages, and since there were no liquidated damages in this instance, no additional payment may be made.

The agreement between owner and architect in this instance provides that the architect may be paid for extra services under certain conditions. One of these conditions is set forth in Article 2, Section 4, of the agreement as follows:

"Sec. 4. Providing contract administration and inspection of construction should the construction contract time be extended due to no fault of the Designer. Charges for extra service will begin on the same date that liquidated damages become applicable, but shall not exceed the amount of said liquidated damages less other direct expenses of the Owner due to excess time on the part of the contractor."
(Emphasis added)

The language of the agreement is unambiguous and clearly states that payment in this case shall not exceed the amount of liquidated damages. As there were none, no additional payment is due the architect.

It should be noted that the form of these agreements has been changed, and that this opinion does not apply to the new agreements not containing this clause.

Robert Morgan, Attorney General
Rafford E. Jones,
Assistant Attorney General

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9 November 1973

Subject: State Departments, Institutions and Agencies; State Department of Social Rehabilitation and Control; State Department of Youth Development; State Board of Youth Development; Powers and Duty of the Board of Youth Development to Hire and Dismiss the Directors of the Schools and Institutions Administered by the State Department of Youth Development; Chapter 134 of the General Statutes of North Carolina

Requested by: Mr. David L. Jones, Secretary
Department of Social Rehabilitation and Control

Question: Does the State Board of Youth Development, as created pursuant to Chapter 134 of the General Statutes, have the sole and complete authority to hire and dismiss the Director of each of the schools and institutions administered by and under the supervision of the State Department of Youth Development?

Conclusion: The authority to hire and dismiss the Director of each of the schools and institutions administered by and under the supervision of the State Department of Youth Development, which include (1) the Stonewall Jackson School, (2) the Samarkand Manor School, (3) the Dobb's School for Girls, (4) the Richard T. Fountain School, (5) the Cameron-Morrison School, (6) the Samuel Leonard School, (7) the Juvenile Evaluation Center, and (8) the C.A. Dillon School, is vested solely in the State Board of Youth Development. G.S. 134-9.

The State Department of Youth Development, formerly the State Board of Juvenile Correction, was created by Chapter 1169, 1971 Session Laws, codified as Chapter 134 of the General Statutes. Chapter 1169 was ratified by the North Carolina General Assembly on July 21, 1971, to become effective November 1, 1971.

G.S. 134-2 sets forth the powers and duties of the State Department of Youth Development, which include, among others, the administration and management of (1) the Stonewall Jackson School, (2) the Samarkand Manor School, (3) the Dobb's School for Girls, (4) the Richard T. Fountain School, (5) the Cameron-Morrison School, (6) the Samuel Leonard School, (7) the Juvenile Evaluation Center, and (8) the C.A. Dillon School.

Chapter 134 also created the State Board of Youth Development (hereinafter "Board"), which consists of nine members appointed by the Governor for definite terms. Members of the Board serve at the pleasure of the Governor who "may remove any member of the Board whenever, in his opinion, such removal is in the public interest, and the Governor is not required to assign any reason for any such removal." G.S. 134-1.

Among the powers and duties of the Board is to "select a director for each of the schools, institutions, and agencies covered by this Chapter." G.S. 134-9.

On or about October 26, 1973, the Secretary of the Department of Social Rehabilitation and Control (hereinafter "Secretary") and the Commissioner of Youth Development advised the directors of the Samuel Leonard School, the Samarkand Manor School, the C.A. Dillon School and the Juvenile Evaluation Center that, effective immediately, each was relieved of his duties as director. The Board did not, prior to October 26, 1973, or subsequent to that day, take any action dismissing a director of a school or institution created by Chapter 134.

On November 2, 1973, at a duly called meeting of the Board which was attended by a quorum, the majority of the Board reinstated each of the four directors previously discharged by the Secretary. Thereafter on November 5, 1973, the Secretary announced that, notwithstanding the action taken by the Board on November 2, the

employment of each of the four directors was terminated.

Since G.S. 134-9 vests within the Board, and no other person or agency, the authority to select, which would include the authority to dismiss, the directors of the schools and institutions administered pursuant to Chapter 134, the action taken by the Secretary in dismissing these directors is null and void, and of no effect.

In ordering the dismissal of these directors, the Secretary acted pursuant to the Executive Organization Act of 1971, Chapter 143 of the General Statutes, which created among others the Department of Social Rehabilitation and Control, headed by the Secretary of the Department of Social Rehabilitation and Control. G.S. 143A-163. The State Board of Juvenile Correction, which was the forerunner of the State Department of Youth Development, was transferred under the Executive Organization Act to the Department of Social Rehabilitation and Control by a Type II transfer. G.S. 143A-166.

As provided in G.S. 143A-6(b), a Type II transfer means the transferrring intact of an existing agency to a principal department so that the agency transferred "shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, *except that under a Type II transfer the management functions of any transferred agency, or part thereof, shall be performed under the direction and supervision of the Head of the principal department.*" (Emphasis added) The term "management functions" as used in G.S. 143A-6(b) means "planning, organizing, staffing, directing, co-ordinating, reporting and budgeting." G.S. 143A-6(c).

Nothing else appearing, therefore, pursuant to the Executive Organization Act of 1971, the Secretary would have the authority to hire and fire the directors of the institutions administered and supervised pursuant to Chapter 134.

The problem here, however, is that the Executive Organization Act of 1971, created by Chapter 864, Session Laws of 1971, was ratified by the General Assembly on July 14, 1971. As we earlier pointed out, Chapter 1169, Session Laws of 1971, which created the State

Department of Youth Development, including the Board, was ratified by the General Assembly on July 21, 1971, seven days after the Reorganization Act. Any conflict between G.S. 143A-6(b) and G.S. 134-9 as to whether the Secretary or the Board has the authority to hire and dismiss the directors of these schools and institutions must be resolved in favor of the later enactment of the General Assembly, G.S. 134-9. "Where one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general Act controlling in regard thereto, *especially where the particular statute is later enacted.*" 7 Strong, N.C. Index 2d, Statutes, §5, p. 73. (Emphasis added)

We point out further that, with respect to the hiring and firing of subordinate employees of the schools and institutions administered pursuant to Chapter 134, this authority is placed in the Commissioner of Youth Development, G.S. 134-8, and not with the Board. Therefore, any action taken by the Board on November 2 ordering the reinstatement of any employees, other than the directors of the institutions, was advisory only and not binding upon either the Secretary or the Commissioner of Youth Development.

In conclusion, since the authority given the Secretary in G.S. 143A-6(b), particularly the management functions of the agency transferred to a department under a Type II transfer, and G.S. 143-9, which specifically places the responsibility and authority in the Board to hire and dismiss the directors of the institution, the statute first enacted must give way to the latter to the extent of the conflict, the last expression of the legislative will on the matter being the law. *Victory Cab Company v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433; *Guilford County v. Estates Administration, Inc.*, 212 N.C. 653, 194 S.E. 295.

Robert Morgan, Attorney General
Andrew A. Vanore, Jr.,
Deputy Attorney General

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13 November 1973

Subject: Courts; Juveniles; Mental Health; Placement of Juveniles in Treatment Facilities and Detention Homes; Authority to Discharge Juveniles from Centers for the Retarded

Requested by: Ann F. Wolfe, M.D., M.P.H.,
Deputy Director, Mental Retardation
Division of Mental Health Services
Department of Human Resources

Questions: (1) In order to take the action authorized by G.S. 7A-286(6) to secure placement of a juvenile in a North Carolina center for mentally retarded, must the juvenile court judge decide the juvenile to be delinquent or undisciplined?

(2) Is a North Carolina center for mentally retarded a "juvenile detention home" for the purpose of taking the type of action authorized by G.S. 7A-286(3)?

(3) Can the North Carolina Division of Mental Health Services discharge on its own initiative a child who has been placed in a center for mentally retarded pursuant to G.S. 7A-286(6) upon determination that detention in the center will not be beneficial to the child or in the best interest of the center?

Conclusions: (1) In order to take the action authorized by G.S. 7A-286(6) to secure placement for a juvenile in a North Carolina center for mentally retarded, the juvenile court judge must determine the juvenile to be delinquent, undisciplined, dependent or neglected.

(2) A North Carolina center for mentally retarded is not a "juvenile detention home" for the purpose of taking action authorized in G.S. 7A-286(3).

(3) The North Carolina Division of Mental Health Services may on its own initiative discharge a child who has been placed at a North Carolina center for mentally retarded pursuant to the provisions of G.S. 7A-286(6) upon determination that retention of the child will not be beneficial to the child or to the best interest of the center.

G.S. 7A-286 is included within Article 23 of Chapter 7A. That Article is entitled "Jurisdiction and Procedure Applicable to Children" and elsewhere in the Article are found statements of the purpose behind the Article and the jurisdiction of the juvenile courts created thereby. G.S. 7A-277 indicates that the procedures set forth in the Article are intended to provide simple judicial process to assure the protection, treatment, rehabilitation or correction which is appropriate in relation to the needs of the child involved and the best interest of the State. G.S. 7A-279 provides that the juvenile court shall have exclusive, original jurisdiction over a child "who is alleged to be delinquent, undisciplined, dependent or neglected, or who comes within the provisions of the Interstate Compact on Juveniles". Some portions of the Article limit the particular provisions of the section or subsection involved to certain classes of children. However, G.S. 7A-286(6) provides that the actions described therein may be taken in "any case". Therefore, it appears to be clear that the legislature intended that the juvenile court, in taking the actions described in subsection (6), would be permitted to act in cases over which the court obtained jurisdiction pursuant to the provisions of G.S. 7A-279.

In providing for detention of a delinquent or undisciplined child before or after a hearing on the merits of his case, the legislature authorized the juvenile court to order such detention "in a juvenile detention home as provided in G.S. 110-24, or if no juvenile detention home is available, in a separate section of a local jail which

meets the requirements of G.S. 110-24." The latter section of the General Statutes provides for the establishment of a detention home to be operated under the supervision of the juvenile court judge. Alternatively, where no detention home is available, G.S. 110-24 provides that the juvenile court judge "may arrange for the care of a child requiring secure custody in a private home, a foster home or in any other available child-care facility." Finally, as the last alternative, absent any of the other described arrangements, the judge is authorized to order temporary detention of the child in a separated section of the local jail. Nowhere in G.S. 110-24--or in Article 9, Chapter 122, which establishes the centers for mentally retarded--is to be found authorization to utilize the centers for mentally retarded as detention homes in actions taken pursuant to G.S. 7A-286(3).

This Office has recently had occasion to examine the existing situation relative to the juvenile court's authority to secure placement of a juvenile needing residential care and treatment for mental impairment in an appropriate facility. See Opinion of Attorney General to Mr. R. Patterson Webb, Assistant Director for Administration, Division of Mental Health Services, dated 9 October 1973, 43 N.C.A.G. 163. As was pointed out in that Opinion, the juvenile court judge is authorized to direct institution of involuntary commitment proceedings under Article 5A, Chapter 122, when the child's mental condition is so severe that it meets the standards of that Article. As was noted, when the problem falls within the description of "mental illness" or "mental retardation", without the aggravating factors required for Article 5A proceedings, then the juvenile court may direct the appropriate mental health director, essentially operating *in loco parentis*, to arrange for admission of the child to the proper facility. As was stressed, the key items governing an individual case would be the intent of the General Assembly relative to the basic purpose for which the treatment facility involved was established and the needs of the individual juvenile.

With these precepts in mind, then it would appear that the following statutory provisions regarding discharge of patients from centers for mentally retarded would be controlling of the case of a child admitted as a result of action under G.S. 7A-286(6):

"§ 122-71.1. *Discharge of patients.*--Any person admitted to a center may be discharged therefrom or returned to his or her parents or guardian when requested by the parents or guardian or when, in the judgment of the State Department of Mental Health, it will not be beneficial to such person or to the best interest of the center that such person be retained longer therein."

From the above, it would appear that the North Carolina Division of Mental Health Services (the successor of the State Department of Mental Health) is vested with authority to discharge a child of this type upon determination of the appropriateness of the discharge within the context of G.S. 122-71.1. While a court order is not required in order to effect this discharge, obviously, close coordination and preplanning should be instituted between the North Carolina Division of Mental Health Services, the area or local mental health director, and the juvenile court in order to insure that the child's welfare is protected.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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13 November 1973

Subject: Public Officers and Employees; Register of Deeds; Bonds; G.S. 109-4; G.S. 161-4; Authority of County to Purchase Indemnity Insurance for Register of Deeds and Employees in Office of Register of Deeds

Requested by: Mr. John T. Page
Richmond County Attorney

Question: Do the county commissioners of Richmond County have authority to authorize the

expenditure of county funds for the purchase of liability insurance for the register of deeds and employees in the office of the register of deeds?

Conclusion:

No. Authority to spend county funds for insurance on the register of deeds, her assistant, deputies and other employees is limited to the purchase of a bond or bonds for the faithful performance of their duties.

G.S. 109-3, 109-4 and 161-4 are as follows:

"§ 109-3. *Condition and terms of official bonds.*—Every clerk, treasurer, sheriff, coroner, register of deeds, surveyor, and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of the office to which such officer is chosen."

"§ 109-4. *When county may pay premiums on bonds.*—In all cases where the officers or any of them named in § 109-3 are required to give a bond, the county commissioners of the county in which said officer or officers are elected are authorized and empowered to pay the premiums on the bonds of any and all such officer or officers. The board of commissioners of any county are further authorized and empowered to require individual or blanket bonds for any or all assistants, deputies or other persons regularly employed in the offices of any such county officer or officers, such bond or bonds to be conditioned upon faithful performance of duty, and, in the event of such requirement, to pay the premiums on such individual or blanket bonds."

"§ 161.4. *Bond required.*—(a) Every register of deeds shall give bond with sufficient surety, to be approved by the board of county commissioners, in a sum of not less than ten thousand dollars (\$10,000) nor more

than fifty thousand dollars (\$50,000), payable to the State, and conditioned for the safekeeping of the books and records, and for the faithful discharge of the duties of his office.

"(b) The bond and surety required under subsection (a) shall further be conditioned for the safekeeping of the books and records, and for the faithful discharge of the duties of office of the register of deeds by any incumbent assistant and deputy register of deeds appointed prior to the vacancy pursuant to G.S. 161-6 and holding over after vacancy in the office of register of deeds for the interim, as provided in G.S. 161-5(b)."

The County Attorney for Richmond County states in a letter to the Attorney General:

"Performance bonds are only for the protection of the public when an official or employee fails to properly perform his duty. As surety, the bonding companies require county employees to reimburse them for any loss the bonding company sustains as surety on a performance bond of the employee. The employees desire liability insurance to protect them from this personal liability for the employees' errors, omissions and negligence in the performance of official duty.

"The question boils down to whether the county can spend public funds to purchase insurance to hold county employees harmless from liability to others for their errors, omissions and negligence."

By their terms, G.S. 109-3 and G.S. 109-4 limit the purchase of bonds with county funds to bonds for "faithful performance". No authorization for the purchase of any type or kind of insurance is contained therein or elsewhere in the General Statutes. It is a well settled principle of law that a county has only such powers as are prescribed by statute or those necessarily implied by law. Strong's N.C. Index 2d, Counties, Sec. 2.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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14 November 1973

Subject: Health; Counties; Board of Health
Membership; Composition and Terms of
Office

Requested by: Honorable James R. Strickland
County Attorney
Onslow County

Questions: (1) In view of the revisions made in G.S.
130-13 by the 1973 General Assembly,
what is the expiration date of the term of
an individual who was an ex officio
member of a county board of health on
April 5, 1973?

(2) Upon what date does a county board
of health expand to a membership of nine
persons as authorized by G.S. 130-13?

(3) Is a county board of health member
appointed under the current G.S. 130-13
limited to three consecutive three-year
terms exclusive or inclusive of prior
membership on the county board of
health?

(4) Does the requirement that the
composition of a county board of health
reasonably reflect the population make-up
of the entire county apply to all nine
members of the board?

Conclusions:

(1) The term of an individual who was an ex officio member of a county board of health on April 5, 1973, will expire on the expiration of the term of the primary office which qualified him for the ex officio membership on the board of health.

(2) The membership of a county board of health expands to nine members upon the expiration of the term of the board member holding office on April 5, 1973, whose term first expires after that date, whether such member was an ex officio or a public member on that date.

(3) A county board of health member appointed under the current G.S. 130-13 is limited to three consecutive three-year terms exclusive of prior membership on the county board of health.

(4) The requirement that the composition of the county board of health reasonably reflect the population make-up of the entire county applies to all nine members of the board.

Prior to revision by the 1973 General Assembly, G.S. 130-13 provided that the county board of health would be composed of three or more ex officio members and four public members. These ex officio members consisted of the chairman of the board of county commissioners, the mayor of the city or town which was the county seat (plus, in some instances, the mayors of other incorporated cities), and the county superintendent of schools. The four public members were appointed by the ex officio members for four year terms and their qualifications were prescribed in the governing statute.

The current G.S. 130-13, effective upon its ratification date of April 5, 1973, provides for a nine member county board of health to be appointed by the board of county commissioners upon

consultation with the local health director. Five of these members are appointed from the general public while the remaining four members include one licensed physician, one licensed dentist, one licensed pharmacist, and one county commissioner. The terms of these members are for three years with the proviso that "no board member may serve more than three consecutive three-year terms."

Chapter 137, Session Laws 1973, was the vehicle by which the current G.S. 130-13 was enacted. In order to properly interpret G.S. 130-13, Section 2 of that Chapter, which reads as follows, must be considered:

"The terms of all members of a county board of health holding office on the date of the ratification of this act shall expire on the same date they would have had this act not been passed. Upon expiration of these terms, their successors shall be appointed to terms of three years and shall serve until their successors have been appointed and qualified. At the expiration of the term of the board member now holding office whose term first expires, the board of county commissioners shall appoint his successor and a sufficient number of persons to bring the membership of the board to nine. The county commissioners may appoint persons to fill vacancies from time to time."

By the language utilized, the General Assembly made it abundantly clear that it sought to insure an orderly transition from the old board of health to the new. Further, and in keeping with this intention, it is manifest that the provisions of the statute are calculated to avoid prematurely divesting any member of his position on the board, with no distinction being made between the ex officio members and the public members. Thus, an ex officio member's tenure on the board would depend upon the termination date of the term of office he was serving in his primary office as of April 5, 1973 (the ratification date of Chapter 137). Similarly, the requirement for reconfiguration of the board will arise upon need for the appointment of the first replacement to the board, with the replaced member's status as an ex officio or public member being an inconsequential factor.

As to the new limitation on the length of consecutive service by a board member, the statute prohibits service of "more than three consecutive three-year terms." The prior statute did not provide for terms of three years, as such, and, significantly, the new statute does not proscribe service beyond a specific number of years as distinguished from a specific number of terms of office. As a result, prior periods or terms of service, however extensive, on the board are immaterial in ascertaining current eligibility for board membership.

In addressing the subject of the composition of the board, G.S. 130-13(d) contains the following general language:

"(d) The composition of the local board shall reasonably reflect the population makeup of the entire county."

Inasmuch as these words used by the General Assembly fail to distinguish between various members, it must be logically concluded that this provision appertains to all nine members--recognizing, of course, that four of the members must possess special qualifications.

Finally, some concern has been expressed as to the exact meaning of the terminology "population makeup of the entire county." Presumably, the General Assembly contemplated that the membership of the county board of health should be consonant with the financial, educational, racial and economic structure of the particular county involved. In appointing board members, consideration should be given to whether the county is predominantly rural or metropolitan, agrarian or industrial, etc. Realistically, the key to fathoming the legislators' intent lies in the terminology "reasonably reflect" contained in G.S. 130-13(d). It would seem that their intention was that, insofar as it is possible and practicable, the board be composed of members capable of recognizing the needs of *all* of the residents of the county who are the recipients of the services rendered by the board of health.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

15 November 1973

Subject: State Departments, Institutions and Agencies; Board of Transportation; Billboards; Highway Beautification; Eminent Domain; Just Compensation

Requested by: Mr. W. H. Webb, Jr.
Manager of Right of Way
Department of Transportation and Highway Safety

Question: Is the Board of Transportation authorized to use the valuation and acquisition techniques of the "Outdoor Advertising Control Act" for billboards located within the limits of highway right of way projects and treated as realty?

Conclusion: No. Signs acquired in connection with the right of way acquisition should be paid for in accordance with just compensation principles for the condemnation of real property. The provisions of the Outdoor Advertising Control Act, G.S. 136-126, *et seq.*, which provide for the payment for the removal of billboards *outside the right of way* as provided in that Act, cannot be applied to those billboards included in the highway right of way acquisition.

Federal Highway Administration Notice of June 1, 1973, advises that whenever outdoor advertising signs are located within the limits of highway right of way projects, they are to be considered as real property and acquired utilizing identical valuation and acquisition techniques as provided for signs acquired under the Highway Beautification Act, if this is at all possible under State law. The Manager of Right of Way for the Division of Highways requested an opinion as to whether or not the Board of Transportation under existing law can make payments for billboards included in the right of way acquisition, in accordance with the provisions of the

"Outdoor Advertising Control Act." (23 U.S.C. 131)

The "Outdoor Advertising Control Act", G.S. 136-126, *et seq.*, passed to comply with the requirements of the federal "Highway Beautification Act", provides for the control of billboards within 660 feet of certain highway rights of way. G.S. 136-131 provides for the compensation to be paid for sign and landowners where billboards and property rights are taken *outside the right of way* but within 660 feet of the right of way under the Outdoor Advertising Control Act. The provisions of the Outdoor Advertising Control Act have no application to *acquisition of right of way* for highway purposes. The compensation to be paid for the acquisition of right of way for highway purposes is based on the fair market value of the realty in accordance with the established principles of law in North Carolina.

Payments for acquisition of real property must be in accordance with the accepted principles of just compensation for the acquisition of realty, and the value of billboards, fixtures, and structures can be considered only insofar as they enhance the value of the real property on which they are located. *Gallimore v. Highway Commission*, 241 N.C. 344, 353. It is the opinion of this Office that the payments for right of way acquisitions on which billboards are located cannot be made in accordance with the provisions of the Highway Beautification Act for which separate payments for signs are made to sign owners without regard to the value which they may add to the realty, but such payments must be made in accordance with the principles of just compensation for the acquisition of real property for right of way.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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15 November 1973

Subject: Escheats; Uncashed Checks; Effect of Laws
of Other States

Requested by: Honorable Edwin Gill,
 State Treasurer

Question: Are funds belonging to persons whose last known residences were in the State of Georgia, held by the Flue-Cured Tobacco Cooperative Stabilization Corporation, subject to escheat to the State of Georgia pursuant to that state's Disposition of Unclaimed Property Act?

Conclusion: Those funds held by the Flue-Cured Tobacco Cooperative Stabilization Corporation which become due and payable on or before December 31, 1969, escheat to the State of North Carolina pursuant to G.S. 116A-4, while those funds which became due and payable on or after January 1, 1970, are subject to escheat to the State of Georgia pursuant to its Disposition of Unclaimed Property Act.

The Flue-Cured Tobacco Cooperative Stabilization Corporation is a North Carolina corporation which has in its possession sums of money which are payable to persons whose last known residences, according to the records of the corporation, were in the State of Georgia. The State of North Carolina has had constitutional and statutory provisions for the escheat of abandoned or derelict property since 1789. Pursuant to those statutory provisions, *i.e.*, G.S. 116A-4 (formerly 116-23), unclaimed sums of money are deemed at law to be derelict property when they have been held without recovery or claim by the parties entitled thereto for a period of three years after said sums of money have become due and payable.

The State of Georgia has enacted a "Disposition of Unclaimed Property Act" which became effective January 1, 1973, pursuant to which such sums of money would be deemed abandoned after fifteen years from the date such sum became due and payable. Section 30 of the Georgia Act reads as follows:

"Section 30. *Effect of Laws of Other States.* This Act shall not apply to any property that has been presumed abandoned or escheated under the laws of another State prior to the effective date of this Act."

The question arises as to whether these sums of money held by the Flue-Cured Tobacco Cooperative Stabilization Corporation escheat to the State of North Carolina or to the State of Georgia pursuant to their respective acts. The Supreme Court of the United States, exercising its original jurisdiction, has established a rule to settle the question of conflicting state escheat claims. This rule provides that intangible personal property, such as the sums here in question, escheats to the state of the last known address of the creditor, here the person to whom the sums are payable, as shown by the debtor's books and records. If the debtor's books show no last known address for the creditor or if the state of last known address has no escheat law, such property escheats to the state of the debtor's domicile subject to a right in the state of the creditor's last known address to claim said property when it can establish that the creditor's last known address was within its borders or when it enacts an applicable escheat law. *Texas v. New Jersey*, 379 U.S. 674, 13 L.Ed. 2d 596, 85 S.Ct. 626, final decree 380 U.S. 578, 14 L.Ed. 2d 49, 85 S.Ct. 1136 (1965).

Applying the rule of *Texas v. New Jersey, supra*, while recognizing the effect of Section 30 of the Georgia Act, leads to the following conclusion: Those sums of money which became due and payable no later than December 31, 1969, *i.e.*, three years prior to the effective date of the Georgia Act, are deemed derelict property by G.S. 116A-4 and its predecessor G.S. 116-23 and must be paid to the Escheat Fund of the State of North Carolina. Those sums of money which became due and payable on and after January 1, 1970, were not subject to escheat under the laws of North Carolina prior to the effective date of the Georgia legislation. Therefore, those sums are properly payable to the State of Georgia upon the expiration of the fifteen-year period provided by the Georgia Act.

Robert Morgan, Attorney General
Russell G. Walker, Jr.,
Assistant Attorney General

15 November 1973

Subject: Labor; Occupational Safety and Health Act of North Carolina; Regulations and Occupational Safety and Health Standards Promulgated Under Federal Act Adopted by the State; Safety and Health Standards for Agriculture; Sanitation in Temporary Labor Camps Used by Migrant Labor; Federal Regulations Adopted by the State Appearing in CFR 1910.142, Vol. 36, No. 105, Dated May 29, 1971

Requested by: Mr. Weldon B. Denny, Assistant Director Occupational Safety and Health Act of North Carolina

Question: Under the Occupational Safety and Health Act of North Carolina, who is responsible for the enforcement of the safety and health regulations adopted relating to temporary labor camps used by migrant laborers--the grower or the crew leader of such migrant laborers?

Conclusion: Under G.S. 95-127(9) an employee is employed not only by the person who directly employs him, but he is also the employee of any business units and agencies owned or controlled by the employer, and, therefore, the grower or owner of the temporary labor camps is responsible for the enforcement of the safety and health regulations cited above.

The federal regulations cited above relate to safety and health standards for agriculture and have been adopted by the State of North Carolina under the Occupational Safety and Health Act of North Carolina (Article 16 of Chapter 95 of the General Statutes). The State plan calls for a joint agreement on methods and procedures to be developed between the Commissioner of Agriculture and the

Commissioner of Labor, and such plan is being developed for approval by April 1, 1974. The regulations cited above have been adopted by the State of North Carolina and relate to temporary labor camps occupied by migrant laborers. Most migrant laborers working in North Carolina are recruited and transported by crew leaders who are responsible in many ways for the welfare of the individual worker, and in most instances this crew leader negotiates with the grower and is responsible for the welfare of the migrant laborers and the working time and place, rate of pay and the conditions and locations of the various accommodations.

Attention is called, first, to G.S. 95-127(16), which is as follows:

"The term 'person' means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives."

Attention is next called to G.S. 95-127(9), as follows:

"The term 'employee' means an employee of an employer who is employed in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer."

It is found, further, in G.S. 95-127(10), as follows:

"The term 'employer' means a person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers employed in the place of residence of his or her employer."

Inasmuch as an employee is defined as an employee in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer: The grower is responsible for the health and sanitation conditions of the temporary labor camps used by migrant workers and the regulations above referred to are enforceable against the grower. Under the provisions of the Occupational Safety and Health Act of North Carolina, we believe that the regulations referred to are

enforceable against both the grower and the crew leader. Under the provisions above cited it was not intended that the device of an independent contractor be used to avoid the application of the Act.

Robert Morgan, Attorney General
Andrew A. Vanore, Jr.,
Deputy Attorney General

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20 November 1973

Subject: Social Services; Adoptions; Consent;
Knowledge of the Identity of the Adoptive
Parents

Requested by: Mrs. Robin L. Peacock
Supervisor of Adoptions
Division of Social Services
Department of Human Resources

Question: Must consent to an adoption be given with
the knowledge of the identity of the
adoptive parents in order for such consent
to be valid under Chapter 48 of the General
Statutes?

Conclusion: Except where consent is given to a licensed
child-placing agency or a county director
of social services in accordance with G.S.
48-9, consent to an adoption must be given
with the knowledge of the identity of the
adoptive parents in order for such consent
to be valid.

In *Ward v. Howard*, 217 N.C. 201, 7 S.E. 625 (1940), the Supreme
Court considered the question of the validity of consent to an
adoption and stated:

"The consent must at least be in fair contemplation

of the proposed adoption, and this includes its most essential feature - the identity of the adoptive parents." (at p. 206)

The Court reached a similar conclusion in *In re Holder*, 218 N.C. 136, 10 S.E. 2d 620 (1940). However, an earlier opinion of the Court, *In re Foster*, 209 N.C. 489, 183 S.E. 744 (1936), held that a release of parental rights and a general consent to adoption of the child was valid and nullified the requirement that the parent be a party to a subsequent adoption.

Public Laws of 1941, Chapter 281, Section 2, amended the existing adoption law to provide that a surrender of a child to a duly licensed child-placing agency or a county superintendent of public welfare and the execution of a general consent to any subsequent adoption terminated the requirement for the parent, parents, or guardian of the person to be a party to and specifically consent to a subsequent adoption. This amendment amounted to the adoption of the Supreme Court's holding in *In re Foster, supra*, and a limitation of the Supreme Court's statement in *Ward v. Howard, supra*.

The adoption law has been revised and amended many times since *Ward v. Howard, supra*. However, the Legislature has only modified the Court's definition of consent in relation to consent given to a licensed child-placing agency or to a county director of social services.

"Where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the Legislature is made clear. Such a construction becomes a part of the law, as it is presumed that the Legislature in passing the latter law knew what the judicial construction was which had been given to the words of the prior enactment." *Brown v. Brown*, 213 N.C. 347, 350, 196 S.E. 333 (1938).

Therefore, it is concluded that, except where consent is given to

a licensed child-placing agency or a county director of social services in accordance with G.S. 48-9, consent to an adoption must be given with the knowledge of the identity of the adoptive parents in order for such consent to be valid. There is no statutory or judicial requirement that this knowledge of the identity of the adoptive parents be predicated upon a meeting of the person giving consent and the adoptive parents.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

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21 November 1973

Subject: Social Services; Aid to the Aged and Disabled Liens; G.S. 108-29, *et seq.*; Chapter 204, Session Laws of 1973; Transfer of Liens to Realty Acquired After Effective Date of Repealing Act Upon Agreement of the Public Assistance Recipient-Lienee

Requested by: Mr. W. W. Speight, County Attorney
Pitt County

Question: May an Aid to the Aged and Disabled Lien created under the provisions of G.S. 108-29, *et seq.*, prior to April 16, 1973, be transferred from one parcel of realty owned by a public assistance recipient before April 16, 1973, to another parcel of realty acquired by the public assistance recipient after April 16, 1973, if said recipient agrees thereto?

Conclusion: An Aid to the Aged and Disabled Lien created under the provisions of G.S. 108-29, *et seq.*, prior to April 16, 1973,

may be transferred, upon agreement of the public assistance recipient-lienee, from a parcel of realty owned by said public assistance recipient before April 16, 1973, to another parcel of realty acquired by the public assistance recipient after April 16, 1973.

G.S. 108-29 provided for the creation of a "general claim and a lien . . . upon the real property of any person who receives assistance to the aged and disabled. The claim and the lien shall be for the total amount of assistance paid to such person from and after October 1, 1951, if the recipient receives assistance as an aged person, or October 1, 1963, if the recipient receives assistance as a permanently and totally disabled person."

Section 1 of Chapter 204 of the Session Laws of 1973 repealed the Aid to the Aged and Disabled Lien Law, *i.e.*, G.S. 108-29 through G.S. 108-37.1, with the following exception:

"Sec. 2. This act shall not apply to any claims and liens created pursuant to G.S. 108-29 prior to the effective date of this act, and such claims and liens shall be entitled to full and complete enforcement as by law heretofore provided.

Sec. 3. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 16th day of April, 1973."

It is our opinion that under the provisions of G.S. 108-29 and Chapter 204 of the Session Laws of 1973 Aid to the Aged and Disabled payments made to a recipient before April 16, 1973, do not constitute a lien on realty which is acquired on or after April 16, 1973, by the person who receives such payment. See 42 N.C.A.G. 270. However, there is no statutory prohibition against a public assistance recipient-lienee *agreeing* to a transfer of an Aid to the Aged and Disabled Lien created under the above mentioned, repealed lien law prior to April 16, 1973, from a parcel of realty owned

by said recipient before April 16, 1973, to another parcel of realty acquired by said recipient after April 16, 1973. In fact, repealed G.S. 108-37.1, which would still be applicable to claims and liens created pursuant to G.S. 108-29 prior to April 16, 1973, provides:

"The county commissioners are authorized to release a specific tract or parcel of realty from the lien described in this article, before or after the termination of a grant of assistance which is the subject of the lien, based upon the circumstances from which the commissioners are satisfied that the release will result in the largest net recovery for the county, State and federal governments, or a net recovery as large as would be made in any other manner. The release shall be by duly executed resolution which shall recite the reasons for the release and the consideration received therefor . . ."

In the factual situation presented in this inquiry, where the public assistance recipient-lienec desires to purchase a new home and the collection of the full amount of the indebtedness and lien for the old age assistance received before April 16, 1973, would preclude such a purchase, it is our opinion that there are valid reasons for the release of a parcel of realty from an Aid to the Aged and Disabled Lien in consideration of the transfer of that lien to the newly acquired realty.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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21 November 1973

Subject: State Departments, Institutions and
Agencies; Natural and Economic
Resources; Sedimentation Control; Storm
Water Runoff

Requested by: Mr. C. B. Shimer, Director
Sedimentation Control Division

Question: May the North Carolina Sedimentation Control Commission in promulgating rules and regulations controlling erosion and sedimentation address storm water runoff?

Conclusion: Yes.

The Sedimentation Pollution Control Act of 1973 provides, in pertinent parts, as follows:

"§ 113A-51. *Preamble.* The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation."

"§ 113A-52. *Definitions.*

* * * *

- (6) 'Land-disturbing activity' means any use of the land by man in residential, industrial, or commercial development, and highway and road construction and maintenance that results in a

change in the natural cover or topography and that may cause or contribute to sedimentation"

"§ 113A-54. *Powers and duties of the Commission.*

* * * *

(c) The rules and regulations adopted pursuant to G.S. 113A-54(b) for carrying out the erosion and sedimentation control program shall:

- (1) Be based upon relevant physical and developmental information concerning the watershed and drainage basins of the State, including, but not limited to, data relating to land use, soils, hydrology, geology, grading, ground cover, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services"

There is a direct relationship between increased storm water runoff and sedimentation from erosion. Land-disturbing activity which changes the natural cover or topography may produce increased storm water runoff which results in sedimentation from erosion. Storm water runoff falls within the relevant factors set out in G.S. 113A-54(c) to be used as the basis for rules and regulations. Accordingly, the North Carolina Sedimentation Commission may address storm water runoff in its rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities.

Robert Morgan, Attorney General
Theodore S. Farfaglia,
Assistant to the Attorney General

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21 November 1973

Subject: Municipalities; Qualification of Appointive Officers, Town Manager; Residency Within the Town; G.S. 160A-147, G.S. 160A-60

Requested by: Mr. R. Kason Keiger,
Town of Kernersville Attorney

Question: Must a town manager appointed pursuant to G.S. 160A-147 be a resident of the municipality after his appointment?

Conclusion: There is no constitutional or statutory provision which requires the town manager, an appointive officer, to be a resident of the municipality in which he serves either before or after his appointment. Of course, the city charter or ordinance of the municipality may require the city manager to be a resident of the municipality in which he serves.

G.S. 160A-147, which authorizes the appointment of a city manager, provides that he need not be a resident of the city or State at the time of his appointment. G.S. 160A-60 provides that residence within a city shall not be a qualification for or prerequisite to appointment to any city office not filled by election of the people unless the charter or an ordinance provides otherwise. The city council shall have authority to fix qualifications for appointive offices but shall have no authority to waive qualifications for appointive offices fixed by charters or general laws.

Under the present North Carolina Constitution, there is no provision therein which requires an appointive officer to be a resident of the municipality which he serves. Therefore we find no constitutional or statutory provision which requires the city manager to be a resident of the municipality, either before or after his appointment. Of course the charter may require the city manager to be a resident of the municipality or the city council by ordinance may fix as one qualification for that appointive office the requirement that the

manager be a resident of the municipality for which he is appointed.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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21 November 1973

Subject: Public Officers and Employees; Dual Office Holding; Member of Redevelopment Commission Serving on City Board of Education; Article VI, Section 9, North Carolina Constitution; G.S. 128-1.1

Requested by: Mr. Charlie B. Casper, City Attorney
Asheboro

Question: May a member of a Redevelopment Commission, an appointive office, serve concurrently as member of the city board of education?

Conclusion: Yes.

A person has been appointed a member of the Redevelopment Commission of the City of Asheboro and was elected in November 1973 as a member of the Asheboro City Board of Education. The question arises as to whether he may serve in both offices concurrently.

Section 9, Article VI of the North Carolina Constitution, provides in pertinent part that no person shall hold concurrently any two offices in this State that are filled by election of the people. No person shall hold concurrently two or more appointive offices or places of trust or profit or any combination of elective and appointive offices or places of trust or profit except as the General Assembly shall provide by general law.

G.S. 128-1.1 provides that any person who holds an appointive office in State or local government is authorized to hold concurrently one other appointive office or an elective office in either State or local government.

Thus pursuant to the above constitutional provisions and the statutory provision, a person may hold concurrently two appointive offices or he may hold concurrently one elective office and one appointive office in either State or local government.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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28 November 1973

Subject: Taxation; Ad Valorem; Exemptions; Real Property Belonging to High Point Jaycees; G.S. 105-278(6)(present law); G.S. 105-278.7 (Law effective January 1, 1974)

Requested by: Mr. Ralph A. Walker,
Assistant County Attorney
Guilford County

Question: Is property exempt from ad valorem taxation under G.S. 105-278(6) or G.S. 105-278.7 that is owned by the Junior Chamber of Commerce of High Point, Inc., operating as the High Point Jaycees, such property being two adjoining lots, one of which is used for Jaycee parking and the other, a building used as the coordinating center for Jaycee public service projects, and for conducting various internal programs, including leadership workshops, parliamentary procedure training and

"Speak-up Jaycee" programs?

Conclusion: The above mentioned property does not qualify for an exemption from ad valorem taxation under G.S. 105-278(6) or G.S. 105-278.7.

The applicable portion of G.S. 105-278.7 states in part:

"(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

- (1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes

* * * *

(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:

- (1) A charitable association or institution,
- (2) An historical association or institution,
- (3) A veterans' organization or association,
- (4) A scientific association or institution,
- (5) A literary association or institution,
- (6) A benevolent association or institution, or
- (7) A nonprofit community or neighborhood organization.

* * * *

(f) Within the meaning of this section:

* * * *

- (4) A charitable purpose is one that has

humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward"

In order to qualify for exemption under G.S. 105-278.7, the property in question must meet two tests. The first is that the property must be wholly owned by an agency listed in subsection (c) of the statute. The second requirement is that the property itself must be wholly and exclusively used by its owner for the exempt purpose, specifically a nonprofit charitable purpose in the instant situation.

The opinions expressed herein are predicated upon existing law and the new law to become effective January 1, 1974 and based upon the information received supporting the request. The information submitted consisted of the Certificate of Articles of Incorporation of the High Point Jaycees and a letter of functional explanation to the Guilford County Attorney from the organization's counsel.

The Attorney General of North Carolina ruled in a 12 November 1962 opinion to the Rowan County Tax Supervisor that property owned by the Junior Chamber of Commerce would not be considered exempt under G.S. 105-278(6)(formerly G.S. 105-296(6)) and such opinion is presently valid.

Effective January 1, 1974, the exemption of real and personal property used for educational, scientific, literary, or charitable purposes will be covered in G.S. 105-278.7. Therefore, it is appropriate to examine the claim for exemption in light of both statutes.

After examining the information submitted, we are of the opinion that the High Point Jaycees is not one of the agencies enumerated in subsection (c) of the statute. This opinion is based upon a review of the purposes set forth in the Certificate of Incorporation and the other information received. We believe that the High Point Jaycees is more appropriately described as a civic organization than one of the types of agencies set forth in the statute.

It is true that the Certificate of Incorporation states that the purpose of organization is to form a benevolent and charitable association, but denominating the organization as such does not in fact cause it to be a charitable and benevolent association. It is possible for an organization to be civic in nature and still carry on certain activities which could be construed as charitable or benevolent.

Advancing the educational, civic, commercial and economic interests of the City of High Point and to have a part in representing the city in the consideration and decision of public policy in municipal, county, State and national affairs are certainly a strong indication that the High Point Jaycees is a civic organization. Additional support that it is a civic organization are its objectives of promoting integrity and good faith, just and equitable principles in business and professional activity, uniformity in commercial usages and acquiring and distributing educational, civic, social, commercial and economic statistics. Participating in community events such as the Eastern Sunrise Service, Christmas Parade, Stock Show and Sale bring about civic betterment and social improvements.

The second statutory requirement is that the property itself be wholly and exclusively used by its owner for charitable purposes. The statute defines a charitable purpose as "one that has humane and philanthropic objectives . . . an activity that benefits humanity or a significant . . . segment of the community" *Webster's Unabridged Third New International Dictionary* defines "humane" to mean "marked by compassion, sympathy, or consideration for other human beings" and "philanthropic" as "dispensing or receiving aid from funds set aside for humanitarian purposes."

Even if the organization met the ownership test enumerated in subsection (c), which in our opinion it does not, we do not believe that the manner in which the property in question is used by the High Point Jaycees entitles it to an exemption. The fact that the organization holds its meetings on the property, employs a secretary to carry out Jaycee business and uses the office as a coordinating center for its projects does not constitute using the property for charitable purposes. The statute was intended to apply only where the charitable purpose was conducted on the property itself through and by the use of the property.

Mere planning and discussion of charitable and benevolent activities or preparation for them would not bring the property within the purview of the statute, when these activities are not actually carried out and completed upon the premises.

Therefore, the property of the High Point Jaycees does not qualify for an exemption from ad valorem taxation under G.S. 105-278.7 and the property is not exempt from ad valorem taxation under G.S. 105-278(6).

Robert Morgan, Attorney General
Norman L. Sloan,
Associate Attorney

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30 November 1973

Subject: Motor Vehicles; Leasing of Aircraft; G.S. 20-3.1

Requested by: Mr. Nick Smith, Director
Enforcement and Theft Division
Department of Motor Vehicles

Question: Do the provisions of G.S. 20-3.1 prohibit the leasing of an aircraft by the Enforcement and Theft Division of the Department of Motor Vehicles?

Conclusion: No.

G.S. 20-3.1 reads as follows:

"§20-3.1. *Purchase of additional airplanes.*-- The Department of Motor Vehicles shall not purchase additional airplanes without the express authorization of the General Assembly."

G.S. 20-3.1 does not specifically prohibit the leasing or renting of

aircraft by the Department of Motor Vehicles.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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4 December 1973

Subject: Mental Health; Criminal Law and
Procedure; Involuntary Commitment of a
Defendant Incompetent to Stand Trial

Requested by: Bob Rollins, M. D.
Director of Forensic Services
Dorothea Dix Hospital

Question: What General Statutes of North Carolina
prescribe the appropriate commitment
proceedings for an individual accused of a
crime who is found to be incompetent to
stand trial for the crime?

Conclusion: The proceedings prescribed by Article 5A,
Chapter 122, General Statutes of North
Carolina should be utilized for the
involuntary commitment of an individual
accused of a crime who is found to be
incompetent to stand trial for the crime.

This question has arisen because of difficulties encountered in correlating the provisions of G.S. 122-84 and G.S. 122-91 with the language of Article 5A of Chapter 122 of the General Statutes. The first two sections are the products of former legislative sessions, with only minor changes in terminology having been engrafted by the 1973 General Assembly. On the other hand, Article 5A is totally new in concept and language and represents the thinking of the 1973 General Assembly relative to involuntary commitment to State mental health facilities.

Insofar as it is pertinent to this opinion, G.S. 122-84 deals with defendants who are accused of serious crimes but, because of mental illness, are unable to undertake their own defense or to receive sentence. This Section provides for an inquisition by the trial judge who then, if he finds such action to be indicated, commits the individual to a mental health facility where he shall remain "until restored to his right mind."

G.S. 122-91 deals with commitment of an "alleged criminal indicted or charged with commission of a felony." It provides that an appropriate judge may commit the defendant to a State facility for observation and treatment for a period of up to sixty days. At the end of that period, upon notification of the trial judge that a defendant is incompetent to plead to the charge against him, this section requires the Clerk of the Superior Court "to initiate proceedings to have the alleged criminal committed for a minimum necessary period under the procedures prescribed by G.S. 122-65."

On the other hand, the General Assembly, in enacting Article 5A, specifically mandated that a " . . . person may be involuntarily committed only in the following ways: . . ." (A recitation of the initial steps for judicial hospitalization and emergency hospitalization then follows). See G.S. 122-58.3. The remaining sections of Article 5A set forth the procedural steps required for involuntary commitments and these steps are quite different from those prescribed by G.S. 122-84 and G.S. 122-91.

Chapter 673 of the 1973 Session Laws (the amendatory vehicle for G.S. 122-84 and G.S. 122-91) was ratified on the same date as Chapter 726 of the 1973 Session Laws which rewrote Article 5A. Thus, despite different effective dates of these two Chapters, the ratification dates of the legislation under consideration cannot be regarded as dispositive of legislative intent. However, there are sufficient significant factors involved to correctly point the way to the legislative thinking on this subject.

Significantly, the 1973 amendments to G.S. 122-84 and G.S. 122-91 were clearly only minor changes in terminology similar to language changes made in a number of other sections in Chapter 122. The new Article 5A is a total rewriting of the involuntary commitment statutes so as to embody drastic conceptual, procedural and

jurisdictional changes. For example, the new procedures completely removed the Clerk of Superior Court from his judicial role in the commitment proceedings. The original G.S. 122-65, referred to in G.S. 122-91, was repealed by the 1973 General Assembly and the new involuntary commitment statutes make no provision for commitment of an individual for "a minimum necessary period"—in fact, that type of open end commitment is precluded. The new involuntary commitment statutes explicitly spell out the items of due process legislatively required and these exceed those specifically guaranteed by the older sections.

Of great importance too, the provisions for retaining the defendant in his commitment status "until restored to his right mind" may well fall afoul of the United States Supreme Court edict (issued prior to the 1973 Session of the General Assembly) that:

" . . . a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

All of these indicators compel the conclusion that the General Assembly intended uniform application of its mandate that Article 5A provides the "only" method of involuntary commitment of an individual, so as to include instances involving persons under criminal charges.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

4 December 1973

Subject: State Departments, Institutions and Agencies; North Carolina Housing Corporation; Housing

Requested by: Mr. William M. Law,
Assistant State Planning Officer
for Administration

Question: The 1973 Session of the General Assembly of North Carolina passed a bill which directed the Housing Corporation, among other things, to undertake no new projects. Prior to that action by the General Assembly, the Housing Corporation entered into a loan commitment for a project in Alamance County. The question is whether or not the developer of the Alamance County project may use funds remaining in the loan commitment on a Guilford County project.

Conclusion: No. Using funds committed to a specific project in one county for another project in another county amounts to undertaking a new project as prohibited by Section 3, Chapter 727, Session Laws of 1973.

On January 19, 1973, the North Carolina Housing Corporation entered into a land development loan agreement with Williams and Linton Realty Company, Inc., (hereafter "developer") for the development of housing for persons or families of lower income in Alamance County. The Housing Corporation funds were to come from the Housing Development fund.

A loan agreement was executed between the Housing Corporation and the developer. The loan agreement specifically refers to and incorporates a deed of trust recorded at Book 425 beginning at page 329 in the Office of the Register of Deeds of Alamance County.

Under the terms of the loan agreement and the deed of trust, the Housing Corporation was obligated to advance \$58,869.00 to the developer for development "*on the premises herein below described*". The advancements were to be made from time to time, and, as development was completed and lots were sold to persons or families of lower income, the Housing Corporation was to be repaid. To date, \$12,800.00 has been advanced to the developer and none has been repaid.

The developer has recently encountered certain problems in developing the Alamance County land. In order to avoid these problems, he proposes to apply the remaining \$46,069 under the loan agreement to another, similar project to be undertaken in Guilford County. The project in Guilford County is similar to that in Alamance County in that the lots are to be for persons and families of lower income. However, the loan money would be used in Guilford County solely for the acquisition of land, rather than for its development.

The Department of Administration, which is administering existing projects of the Housing Corporation, now inquires whether or not monies remaining from the January, 1973, commitment to the Alamance project may be applied to a Guilford County project in light of Chapter 727 of the Session Laws of 1973.

On May 23, 1973, the 1973 Session of the General Assembly of North Carolina ratified Chapter 727 of the 1973 Session Laws. That Chapter related to the North Carolina Housing Corporation in general, and Section 3 is relevant to the present inquiry:

"The North Carolina Housing Corporation is granted express authority to complete projects presently under way and directed to undertake no new projects or to make any new expenditures except as may be incidental to or required by projects presently under way and as may be necessary to the winding up of its affairs . . . "

The real question is whether or not transferring funds from the Alamance project to a Guilford County project would constitute a "new project" as prohibited by Section 3, quoted above. The

answer is, clearly, that committing funds to the Guilford County project would constitute undertaking a new project.

Not only are the Alamance and Guilford County projects separate and distinct, but also they are different in kind. The Alamance project is for the development; the Guilford project is for acquisition. New loan agreements and deeds of trust and notes would have to be executed before the money could be used in Guilford County. New action by the successor of the Housing Corporation would have to be taken to approve the Guilford County project.

All these things make it evident that the Guilford County project is a new project, and that funds committed to the Alamance County project cannot be transferred to the Guilford County project.

Robert Morgan, Attorney General
Charles Lloyd,
Assistant Attorney General

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4 December 1973

Subject: State Departments, Institutions and
Agencies; Area Mental Health Boards; Tort
Liabilities; Board Members; Authority to
Sue and Be Sued; Ownership of Property;
Employees of Area Mental Health Boards

Requested by: Mr. Carter T. Lambeth,
Treasurer
Southeastern Mental Health Board

Questions: (1) Are employees of area mental health
boards State employees?
(2) (a) Are area mental health boards
political subdivisions of the State?

(b) Are area mental health boards empowered to acquire and hold property?

(3) (a) Is an area mental health board or its duly constituted board members liable in tort actions?

(b) Is an area mental health board responsible for obtaining casualty insurance for office furniture and other property?

(4) What entity owns property used by an area mental health board?

Conclusions:

(1) Employees of area mental health boards are not State employees.

(2) (a) Area mental health boards are political subdivisions of the State, but are local in nature.

(b) Area mental health boards may acquire and hold property obtained with local and federal funds, title being in the area program.

(3) (a) Unless specifically authorized by the creating act or otherwise by statute, political subdivisions of the State enjoy sovereign immunity and the act authorizing creation of area mental health boards does not authorize suits against either such board or its duly constituted members.

(b) An area mental health board is not responsible for obtaining casualty insurance for office

furnishings and other property used in its operations.

(4) Title to property obtained and used by an area mental health board remains in the area program.

The paramount question is whether an area mental health board is an agency of the State of North Carolina possessing all the attributes that an agency of the State usually possesses or whether it is local in nature. The answer to this question would appear to be dispositive of all four questions.

Without question, local mental health clinics established pursuant to Article 2A are local in nature, even though supervision is under the North Carolina Department of Human Resources and even though State funds are, in part, supplied for the operation of such clinics. Further, under Article 2A of Chapter 122 all real estate, buildings, and equipment necessary for the operation of local mental health clinics remain the property of the local mental health clinic even though purchased with local or federal funds; however, where two or more governmental units combine to establish joint mental health services, the same by agreement may be supplied from the funds of and remain the property of the local governmental unit in which they are located. See G.S. 122-35.9.

It is likewise apparent that the legislature in enacting necessary legislation for the establishment of area mental health programs intended the act to be broad enough to cover areas comprising more than one county, but remaining local both in nature and operation. While it is true that some control over area mental health boards and area mental health programs is retained by the State by virtue of the rule and regulation making powers of the State Commission for Mental Health Services, the area boards within this framework operate within the authority conferred by Article 2C of Chapter 122. In addition, area mental health programs are joint undertakings of the counties or portions thereof included in the designated area and the Department of Mental Health. See G.S. 122-35.19. Funds appropriated pursuant to G.S. 122-35.23A come from funds appropriated to the Department of Human Resources and are intended to encourage participation in the area mental health programs.

G.S. 122-35.23A provides in part that:

"Appropriations to area programs shall be used exclusively for the operating costs of the programs with all real estate, buildings, and equipment necessary to the operation of such program being provided by local or federal funds, or both, and title to such property shall remain with the area program."

Prior to 1973, area mental health boards operated under the supervision, direction and control of the State Board of Mental Health.

G.S. 122-35.20(e) was amended in 1973 to read:

"Subject to the rules and regulations of the State Commission for Mental Health Services, the area mental health board shall be responsible for . . . "

This Office is of the opinion that area mental health boards are governmental entities, local in nature.

With respect to question number 1, inasmuch as an area mental health board is an entity which is local in nature, it follows that employees are local employees rather than employees of the State of North Carolina.

As to questions numbers 2(a) and 2(b), area mental health boards are local political subdivisions of the State although not necessarily controlled by the counties. The power to acquire and retain property and equipment necessary for the operation of the program is conferred by statute and title to such property remains in the area program. Additionally, this property may only be purchased with local or federal funds, with appropriations made by the State being used exclusively for operating costs of the programs.

Concerning questions 3(a) and 3(b): Area mental health boards are creatures of the legislature established for the purposes specified in G.S. 122-35.19 and operate under rules and regulations of the State Commission for Mental Health services. At the very least, area mental health boards constitute an entity created by the legislature with

governmental functions. An action cannot be maintained against the State or an agency of the State unless it consents to be sued, and ordinarily express consent is a prerequisite. This rule extends to political subdivisions of the State in the exercise of governmental functions, and such agency cannot exceed the authority conferred upon it. See 7 Strong, N. C. Index 2d, State Sec. 4, pp 40-41. Generally speaking, an agency of the State may maintain an action in its own courts; however, unless specifically authorized by the creating act or otherwise by statute, such entity enjoys sovereign immunity. The act authorizing the establishment of an area mental health board does not authorize suits either against the board or its duly constituted board members.

Article 2C of Chapter 122 does not authorize an area mental health board to obtain casualty or liability insurance for its protection or that of its employees.

As to question 4: G.S. 122-35.23A provides that title to all real estate, buildings and equipment necessary to the operation of the program remains in the area program. If an area mental health board were an agency of the State, title to all purchased real property would be in "the State of North Carolina". See G.S. 146-24.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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4 December 1973

Subject: Building Code; Insulation of Buildings to
Conserve Energy; Minimum Energy
Efficiency Standards for Heating, Cooling
and Ventilating Equipment; G.S. 143-138

Requested by: Mr. Fowler Martin,
Executive Director
Energy Crisis Study Commission

Question: Does the North Carolina Building Code Council have the authority pursuant to G.S. 143-138 to amend the Building Code to require insulation of buildings, private residences, etc., and to provide minimum efficiency standards for heating, cooling and ventilating equipment in order to conserve energy?

Conclusion: The North Carolina Building Code Council does have the authority pursuant to G.S. 143-138 to amend the Building Code to require insulation of buildings, private residences, etc., and to provide minimum efficiency standards for heating, cooling and ventilating equipment in order to conserve energy.

G.S. 143-138(b) reads as follows:

"(b) *Contents of the Code.*—The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; regulations governing construction and precautions to be taken during construction; regulations as to permissible materials, loads, and stresses; regulations of chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; regulations governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules and regulations pertaining to the construction of buildings and

structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large."

G.S. 143-138 specifically provides for standards in the Building Code concerning ventilation, heating, and air conditioning. Thus, minimum energy efficiency standards for heating, cooling, and ventilating equipment may properly be included in the North Carolina Building Code. G.S. 143-138 also provides that the Building Code shall include reasonable rules and regulations pertaining to construction which are necessary for the protection of "members of the public at large." Recent acts in both the executive and legislative branches of the federal government indicate that energy supplies will not be sufficient for our needs unless consumption of energy is reduced by at least 10%. Estimates of the duration of this energy crisis range from three to ten years. It is essential, therefore, that measures be taken to insure the most efficient use of our supplies of energy.

We conclude, therefore, that insulation requirements for buildings and private residences so that energy will be conserved are "reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large," and may be properly incorporated into the North Carolina State Building Code.

Robert Morgan, Attorney General
Miss Ann Reed,
Assistant Attorney General

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10 December 1973

Subject: Taxation; Intangibles Tax; Accounts
Receivable; Finance Reserves

Requested by: Mr. A. R. Waters, Jr., Director
Intangibles Tax Division
North Carolina Department of Revenue

Question: For purposes of intangibles tax, are finance reserves payable to a dealer an account receivable or a note receivable?

Conclusion: Finance reserves payable to a dealer are an account receivable to the dealer.

This opinion is based upon the following circumstances:

A dealer, including but not limited to a motor vehicle dealer, finances installment sales through resale to a finance company of installment paper received by the dealer from a buyer. The finance company by contract between the dealer and finance company retains part of the proceeds payable to the dealer upon the resale as security for the dealer's guarantee that the buyer will make the payments and credits the payments to a dealer's or finance reserve account. When the reserve exceeds an agreed-upon percentage of the total amount outstanding on obligations sold by the dealer, such excess is paid or credited to the dealer by the finance company.

For purposes of the intangibles tax, is such finance reserve payable to a dealer to be treated as an account receivable by him, or as a note receivable?

The dealer in the instant situation by contract agreement transfers and assigns to the finance company the note acquired from the purchaser. The finance company establishes a reserve account in which the finance company will credit from time to time sums equal to the amounts by which the finance charges exceed the finance company's discount.

The dealer has assigned the note and thus retains no interest in the note. The dealer does not have in its possession an evidence of ownership of the note, because the note is now in the possession of the finance company. What the dealer does possess is the right to receive money from an open account. The interest of a dealer in a dealer reserve is not a note receivable and G.S. 105-202 does not apply. Therefore, the dealer is not in a position to claim ownership of the note, since the finance reserve represents a "holdback" of funds from the dealer and such sums constitute an account receivable.

Robert Morgan, Attorney General
Norman L. Sloan,
Associate Attorney

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12 December 1973

Subject: Municipal Corporations; Public Records;
All Municipal Records are Public Records
Subject to Inspection by Members of the
Public; Chapter 132 of the General Statutes

Requested by: Honorable R. L. Davis,
Mayor
Town of Ayden

Question: Are municipal records and papers, such as
budgets, bank statements, tax levies, utility
accounts, minutes of meetings, etc., public
records which may be inspected by
members of the public?

Conclusion: Yes.

G.S. 132-1 provides that public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business. G.S. 132-6 provides that every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person and he shall furnish certified copies thereof on payment of fees as prescribed by law.

G.S. 132-9 provides that any public official who refuses or neglects to perform any duty required of him by this Chapter shall be guilty of a misdemeanor and upon a conviction, fined not more than \$20.00 for each such refusal or neglect.

Some city charters contain provisions similar to Chapter 132 which makes the public records of a municipality available to the citizens.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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12 December 1973

Subject: Public Officers and Employees; Double Office Holding; County Officers; Tax Supervisor Serving as County Accountant; One Person May Hold Two Appointive Offices Concurrently Unless Prohibited by Statute; Article VI, Section 9, North Carolina Constitution; G.S. 128-1.1

Requested by: Honorable Bruce Wike,
Chairman, Board of Commissioners
Jackson County

Question: May one person hold the position of county accountant and the position of tax supervisor concurrently and serve as a member of the Board of Trustees of the technical institute, a member of the County Recreation Commission, a member of the Jackson County Library Board, and a member of the Planning Economic Development Commission?

Conclusion: Pursuant to Article VI, Section 9 of the North Carolina Constitution and G.S. 128-1.1, enacted pursuant thereto, one person may hold two appointive offices concurrently unless some other statute specifically prohibits the particular position

from being held concurrently with another elective or appointive office.

The position of county accountant, as it existed under G.S. 153-115, prior to its repeal and as that position now exists pursuant to G.S. 159-24, which permits the county finance officer to be entitled accountant, treasurer, finance director or finance officer, is a position specified as an appointive public office. The office of tax supervisor is created pursuant to G.S. 105-294 and is a public office. G.S. 105-294(d) provides that, pursuant to the Constitution, the office of county tax supervisor is declared to be an office that may be held concurrently with any other appointive or elective office other than member of the board of county commissioners.

G.S. 159-24 provides that the duty of the finance officer may be imposed on the budget officer or any other officer or employee on whom the duties of budget officer may be imposed. G.S. 159-9 provides that in counties and cities having the manager form of government, the county or city manager shall be the budget officer. In counties not having the manager form of government, the duties of the budget officer may be imposed upon the county finance officer or any other county officer or employee except the sheriff, or in counties having a population of more than 7,500, upon the register of deeds.

Thus the question arises as to whether the duties of the finance officer, or accountant, have been imposed upon the tax supervisor or whether the duties of the county tax supervisor have been imposed upon the office of county accountant. In the event this person is holding two separate offices, one as county accountant and one as tax supervisor, then, under the Constitution, he has reached his quota permitted by law. On the other hand, should the duties of county accountant be imposed upon the tax supervisor, then he holds only one office and the duties of the other office have been imposed upon him to be performed ex officio and in such event he would not be holding two offices.

The other offices listed are appointive offices but this person may serve in only two appointive offices concurrently. Therefore, once he had assumed the duties of two public offices, he would not be able to hold any other appointive or elective office.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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12 December 1973

Subject: Motor Vehicles; Registration Fees; G.S.
20-64(f); Refunds

Requested by: Mr. J. M. Penny,
Assistant Commissioner
Department of Motor Vehicles

Questions: (1) A carrier licensed a vehicle in 1972 and purchased a 1973 license costing more than \$60.00 for the same vehicle on January 30, 1973. Then, upon finding that the vehicle had been traded January 15, 1973, turned the 1973 new and apparently unused license in to the Department on February 22, 1973. Would the carrier be entitled to full refund including driver education fee or would the carrier be entitled to refund on the unexpired portion of such license on a monthly basis beginning the first day of March, 1973?

(2) Would this same carrier or an individual, under the same factual situation set out in question (1) above, paying less than \$60.00 be entitled to a refund?

Conclusions: (1) Carrier would be entitled to a refund on a monthly basis beginning the first day of March.

(2) No.

Regarding Conclusion Number (1), G.S. 20-64(f) reads as follows:

"(f) Whenever the owner of a registered vehicle transfers or assigns his interest to another, such transferor may, by surrendering the registration plate to the Department, secure a refund of the unexpired portion of such plate on a monthly basis, beginning the first day of the month following surrender of the plate to the Department, provided, that the annual license fee for such surrendered plate is sixty dollars (\$60.00) or more."

To be entitled to a refund under G.S. 20-64(f), the annual license fee must be \$60.00 or more, the purchaser of the plate must transfer his interest in the vehicle for which the plate was purchased (including a leasehold interest), and the plate must be surrendered to the Department of Motor Vehicles. Any refund under this section is on a monthly basis beginning the first day of the month following surrender of the plate. Therefore, all conditions having been met in the facts presented in Question (1), the plate having been turned in on February 22, refund should be from March 1.

As to Conclusion (2), the annual license fee being less than \$60.00, there is no provision for a refund.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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12 December 1973

Subject: Counties; Mental Health; Real Property;
Acquisition by Lease for Mental Health
Building

Requested by: Mr. Bennett H. Perry, Jr.,
County Attorney
Vance County

Question: May a county construct a necessary building upon a leasehold interest in real property?

Conclusion: A county may construct a necessary building upon property leased for that purpose provided the duration of the lease exceeds the life of the anticipated improvements.

G.S. 153A-158 authorizes a county to acquire by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real property for use by the county or any agency thereof. G.S. 153A-165 authorizes a county to lease as lessee, with or without option to purchase, any real or personal property for any authorized public purpose.

G.S. 153A-247 authorizes the county to provide mental health programs pursuant to Chapter 122 of the General Statutes.

Under G.S. 153-65(c) a county may levy certain taxes for authorized purposes one of which is set forth under subsection (c)(22) as follows:

"Mental health.--To provide for the county's share of the cost of maintaining and administering services offered by or through the county or area mental health department."

Under Chapter 122, Articles 2A and 2C of the General Statutes, a county is authorized to participate in and assist in both local and area mental health programs, the area programs being joint undertakings with the county or portions thereof involved and the Department of Human Resources.

It is clear that the Legislature intended to and did authorize counties to acquire less than fee simple interest in real property for necessary purposes. It is equally clear that construction of a comprehensive mental health facility is such a purpose and one contemplated by Chapter 122 of the General Statutes. However, the lease must be

of sufficient duration to exceed the life of the improvements to be located thereon; additionally it must be of such nature as to give the county complete control of the facility for the lease period. A proper lease for 99 years would appear to fulfill these requirements.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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12 December 1973

Subject: Sheriffs, Deputy Sheriffs; Appointment for
Special Duty

Requested by: Mr. William W. Sturgess
Attorney for Charlotte-Mecklenburg
Board of Education

Questions: (1) Does the Sheriff of Mecklenburg
County have authority to appoint
Charlotte-Mecklenburg school security
personnel as deputies?

(2) If so, can such deputies exercise all the
non-judicial powers and authorities of the
sheriff, such as making arrests, making
investigations, etc.?

(3) Do they fall within the exempted class
under the concealed weapons statute?

Conclusions: (1) Yes.

(2) Yes.

(3) Yes, while engaged in the performance
of their official duties.

The facts presented indicate the Charlotte-Mecklenburg Board of Education has a security force composed of persons employed by the Board of Education and subject to its control and supervision. These persons are paid by the Board of Education. The security personnel have been appointed and sworn in as special deputies by the Sheriff of Mecklenburg County. They receive no compensation from the Sheriff and are not under his control or supervision. The special deputies carry concealed weapons.

The office of deputy sheriff is a common-law office. There is no general statute creating the position of deputy sheriff in this State, although G.S. 153-48.3(2) provides that each sheriff shall be entitled to at least one deputy to be compensated by the county.

In *Borders v. Cline*, 212 N.C. 472, at page 476, the Court wrote:

"There is no statutory authority for appointment of deputies sheriff. However, 'the deputy is an officer coeval in point of antiquity with the sheriff.' *Lanier v. Greenville*, 174 N.C. 311, 93 S.E. 850.

"'There are two kinds of deputies sheriff well known in practice: (1) A general deputy or under sheriff who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of the sheriff, and who executes process without special power from the sheriff; and (2) a special deputy, who is an officer *pro hac vice*, to execute a particular writ in some certain occasion, and who acts under a specific and not a general appointment and authority.' *Lanier v. Greenville, supra*.

"It is said in 57 C.J., 731, sec. 4, 'A deputy is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person or right, and although ordinarily appointed by the sheriff, is considered a public officer.'

"The duties and authority of a deputy sheriff relate only to the ministerial duties imposed by law upon the sheriff."

In *Lanier v. Greenville*, 174 N.C. 311, at pages 316-317, we find:

"Again quoting from 35 Cyc. 1516: 'While the judicial functions of a sheriff cannot be delegated to another, the ministerial duties of the office may be performed by a deputy sheriff, or under-sheriff, who, however, performs the duties delegated to him, not in his own name or right, but as the representative of the sheriff, although he is recognized as a public officer. There are two kinds of deputies well known in practice: (1) A general deputy, or under-sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the sheriff, and who executes process without special power from the sheriff; and (2) a special deputy, who is an officer *pro hac vice* to execute a particular writ in some certain action, and who acts under a specific and not a general appointment of authority.

"Deputy sheriffs are of two kinds: (a) A general deputy, or under-sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of sheriff (Com. Dig. tit. "Viscount", 542 B.1); one who executes process without special authority from the sheriff, and may even delegate authority in the name of the sheriff, or its execution, to a special deputy. (b) A special deputy, who is an officer *pro hac vice* to execute a particular writ on some certain occasion, but acts under a specific and not a general appointment and authority. *Allen v. Smith*, 12 N.J. Law (7 Halst.), 159, 162.

"The deputy is an officer coeval in point of antiquity with the sheriff. The creation of deputies arises from an impossibility of the sheriff's performing all the duties of his office in person"

"Deputies, known as under-sheriffs, are appointed because the duties of the sheriff are more than one man can perform, and these duties frequently require action at different places at the same time, and the

transaction of public business would be greatly impeded if their acts, in proper cases, were regarded as invalid and without authority of law."

In *Gowens v. Alamance County*, 216 N.C. 107, at 109, our Court stated:

" . . . There is no constitutional authority for appointment of deputies sheriff. The right of the sheriff to appoint deputies is a common law right. 'The deputy is an officer coeval in point of antiquity with the sheriff.' *Lanier v. Greenville*, 174 N.C. 311, 93 S.E. 850; *Borders v. Cline*, 212 N.C. 472, 193 S.E. 826. He is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person or right, and although ordinarily appointed by the sheriff, is considered a public officer. 57 C.J., 731, Sec. 4. The duties and authority of a deputy sheriff relate only to the ministerial duties imposed by law upon the sheriff. *Borders v. Cline*, *supra*."

We must determine whether the appointment by the sheriff constitutes the school security personnel general or special deputies. As noted in the above cases, a special deputy is an officer *pro hac vice*, which means he was appointed for this one particular occasion to execute a particular writ, and who acts under a specific and not a general appointment and authority. Usually the appointment must be in writing. 80 C.J.S., Sheriffs and Constables, Sec. 29.

The appointments signed by the Sheriff of Mecklenburg County use the words "Special Deputy Sheriff"; however, the language in the appointments contains no restrictions or limitations. Thus we conclude that the security personnel have been appointed as general deputies notwithstanding the insertion of the word "Special" in the appointment.

We find no statute or cases in this jurisdiction which speak directly to the factual situation presented. Although the security personnel are hired, supervised, and paid by the Board of Education, they derive their police power from the Sheriff.

Several interesting questions arise to which we have found no definitive answer. Do the security personnel occupy dual positions as employees of the School Board and as deputies? Does the School Board or the Sheriff incur liability for the acts of the security personnel? Who is responsible for workmen's compensation?

The cases of *St. Louis, I.M. and Southern Railway Co. v. Hackett*, 24 S.E. 881; *Texas and N. O. R. Co. v. Parsons*, 113 S.E. 914; *Lancaster v. Carter*, 255 S.E. 392, involved questions of liability where a person had been employed, supervised, and paid by a private person or corporation as a night watchman or guard, and such person had been appointed as a deputy by the sheriff although the sheriff did not exercise any control over the deputy. The Court held in each case that the sheriff had no authority to appoint or detail a deputy to guard and watch private property except in specific cases of threatened injury, or when the property was in the custody of the law.

The facts presented for consideration can be distinguished from the above cases in that the deputies are protecting public property and all citizens who may be at the school, and, in addition, under their appointment, the Sheriff could call upon these deputies to perform duties throughout the County should the need arise.

G.S. 97-2(3), for purposes of workmen's compensation, makes the commissioners of the county "employer" of persons serving as deputy sheriffs within the county whether appointed by the sheriff or the commissioners, and whether serving on a fee or salary basis.

Based upon the foregoing cases, we conclude that the Sheriff has the authority to appoint the security personnel as general deputies for the purpose of enforcing the laws as the representative of the Sheriff. As such, these deputies can exercise the ministerial duties of the Sheriff. See *Borders v. Cline*, 212 N.C. 472; *Gowens v. Alamance County*, 216 N.C. 107; *Lanier v. Greenville*, 174 N.C. 311.

G.S. 14-269 prohibits the carrying of concealed weapons, but exempts "officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties." Thus the security personnel

may carry concealed weapons while in the performance of their official duties as deputy sheriffs of the county.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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13 December 1973

Subject: State Departments, Institutions and Agencies; Police Power; Sale of Fire and Police Protection by John Umstead Hospital to Residents of Butner

Requested by: Mr. R. Patterson Webb,
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Question: Is John Umstead Hospital authorized to sell police and fire protection to property owners at Butner?

Conclusion: John Umstead Hospital is neither authorized nor empowered to sell police and fire protection to property owners of Butner.

All legislative power resides in the General Assembly which may in exercising the police power of the State legislate for the protection of the public health, safety, morals and general welfare of the people. Public policy also rests with that body. *Martin v. Housing Corporation*, 277 N.C. 29, 175 S.E. 2d 665 (1970). The legislature may grant power to administrative boards and commissions to promulgate rules and regulations for the administration of the law, but rules adopted by such administrative agencies under such grant of power do not have the effect of substantive law and may not contravene the statutory provisions involved. 2 Strong N.C. Index

2d, Constitutional Law, Section 7, pp. 194-195.

Chapter 122, Article 12 of the General Statutes confers upon the Department of Human Resources discretionary authority to make rules and regulations and adopt ordinances relating to the police power functions specified therein. These include a variety of activities, the regulation of which would tend to promote the health, safety, morals and general welfare and may apply to the entire original Camp Butner reservation. G.S. 122-95.

G.S. 122-98 authorizes the appointment of special police officers for the purpose of enforcing the provisions of Article 12 and any rule or regulation adopted pursuant thereto. However, an agency of the State is powerless to exceed the authority conferred upon it. See *Slosh v. Highway Commission*, 230 N.C. 489, 53 S.E. 2d 517 (1949).

Nowhere in the enabling legislation is authority found authorizing the sale of police and fire protection to the residents of Butner either singularly or collectively. The fee to be charged for such services being based upon the county property evaluation would in no manner alter the foregoing. Absent statutory authorization, this Office is of the opinion that neither John Umstead Hospital nor the Department of Human Resources may sell fire and police protection to the residents of Butner.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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13 December 1973

Subject: Education; Liability Protection for Adult
Volunteer School Bus Monitors; G.S.
115-185(d); G.S. 115-193; G.S. 143-300.1

Requested by: Mr. D. W. Baucom,
Assistant Director

Transportation Department
Charlotte-Mecklenburg Board of Education

Questions:

(1) Does the school principal under the provision of G.S. 115-185 have authority to assign an adult volunteer to a school bus as a school bus monitor?

(2) Would an adult monitor assigned to a school bus by the principal be considered a legal passenger and be provided with liability protection as enjoyed by a student passenger under the provisions of G.S. 115-193 and G.S. 143-300.1?

Conclusions:

(1) Yes.

(2) No.

G.S. 115-185(d) reads as follows:

"(d) The principal of a school, to which a school bus has been assigned, may, in his discretion, appoint a monitor for any bus so assigned to such school. It shall be the duty of such monitor, subject to the direction of the driver of the bus, to preserve order upon the bus and do such other things as may be appropriate for the safety of the pupils and employees assigned to such bus while boarding such bus, alighting therefrom or being transported thereon, and to require such pupils and employees to conform to the rules and regulations established by the county or city board of education for the safety of pupils and employees upon school buses. (1955, c. 1372, art. 21, s. 6.)."

Clearly this statute does provide authority for the school principal to assign an adult volunteer to a school bus as a school bus monitor.

In answer to question (2), the provisions of G.S. 115-193 do *not* apply to an adult monitor assigned to a school bus by the principal, since this statute specifically names "any pupil" as the recipient

of compensation not to exceed six hundred dollars (\$600.00).

The provisions of G.S. 143-300.1 do not provide liability protection since the adult monitor would not be classified as a "driver" as specified in said act.

To clarify the second question and answer, it must be noted that the second question incorrectly presumes that the student passenger has liability protection which it does not. The student passenger as a "pupil" under G.S. 115-193 is entitled to compensation up to the maximum of six hundred dollars (\$600.00). Liability protection under G.S. 143-300.1 applies only to a school bus "driver".

Robert Morgan, Attorney General
Raymond W. Dew, Jr.,
Assistant Attorney General

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13 December 1973

Subject: Clean Water Bond Act of 1971 (Chapter 909, 1971 Session Laws); Application for Grants; Effect of Noncompliance with Administrative Rules and Regulations Implementing the Act

Requested by: Mr. James F. Stamey,
Assistant Chief
Sanitary Engineering Section
Division of Health Services
Department of Human Resources

Question: May a retroactive grant of funds be made by the Division of Health Services to a local unit of government for a water supply system project placed under construction subsequent to the termination date for retroactive grants prescribed by the Rules

and Regulations adopted by State administrative agencies for administering the Clean Water Bond Act of 1971?

Conclusion:

A retroactive grant of funds may not be made by the Division of Health Services to a local unit of government for a water supply system project placed under construction subsequent to the termination date for retroactive grants prescribed by the Rules and Regulations adopted by State administrative agencies for administering the Clean Water Bond Act of 1971.

Funds obtained through the Clean Water Bond Act of 1971 are designed for use as grants to units of government for construction or improvement of waste water treatment works, waste water collection systems and water supply systems. (See Section 7, Chapter 909, Session Laws 1971 General Assembly.) The Department of Administration, the Board of Water and Air Resources and the State Board of Health (or their successors) are charged with responsibility for administering the act, and Section 14(a) thereof provides as follows:

"Sec. 14. *Rules and regulations.*—(a) Adoption. The Department of Administration, the State Board of Health and the Board of Water and Air Resources, in order to accomplish the efficient administration and uniform application of this act, are empowered to adopt, modify and revoke rules of procedure establishing and amplifying the procedures to be followed in the administration of this act and regulations interpreting and applying the provisions of this act. To the extent practicable and appropriate, uniform rules and regulations shall be jointly adopted; and no rule or regulation jointly adopted may be modified or revoked except upon concurrence of all three agencies."

Rule 15.5(b), which has been jointly adopted by the State

administering agencies, provides that retroactive grants may be made for water supply system projects placed under construction on or after July 1, 1972, and prior to June 30, 1973. Elsewhere in this subsection the terminology "placed under construction" is defined as meaning "the date of award of the contract by the applicant."

The application giving rise to the question under consideration was forwarded by a city in North Carolina and contains a substantial item involving water pumping equipment. Documentation furnished established that the pumping equipment has been purchased by the city and that this purchase was based upon a resolution adopted by the Board of Aldermen of the city on July 2, 1973—some two days outside of the time limitations levied by Rule 15.5(b).

When this chronology of events is correlated with the plain language of Rule 15.5(b), it is clear that the State Agency responsible for acting on this application (the Division of Health Services, Department of Human Resources) is not authorized to approve this retroactive grant.

A prior opinion of this Office dealt with the subject of applications for retroactive grants in situations arising prior to adoption of rules, regulations and procedures for administering the Act. See opinion of Attorney General to Mr. Marshall Staton, Director, Sanitary Engineering Division, 42 N.C.A.G. 16 (1972). Nothing in that opinion is in conflict with the present one. In fact, the last paragraph of that prior opinion furnished a timely warning as to the probable consequences of failure to adhere to rules and regulations promulgated under the North Carolina Clean Water Bond Act of 1971.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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14 December 1973

Subject: Prisons and Prisoners; Parolees;
Photographs of; Furnished to Law
Enforcement Officials

Requested by: Mr. J. Mac Boxley,
Chairman, Board of Paroles

Question: On release of a prisoner on parole, may
photographs be made of him by prison
officials and may those photographs be
furnished to law enforcement officials in
the county and city where the parolee will
be living while on parole?

Conclusion: Photographs may be made of prisoners by
prison officials and those photographs may
be furnished to law enforcement officials
in the county and city where the prisoner
will reside while on parole.

Article 7, Chapter 148 of the North Carolina General Statutes establishes a "Record Section" in the Prison Department and defines and identifies the duties of that Record Section. This Article requires the Records Section to maintain case records on prisoners and to receive and collect fingerprints, photographs and other information which may assist in locating, identifying and keeping records on all North Carolina prisoners. It further provides that those records will be made available to law enforcement agencies, and other officials requiring criminal identification, crime statistics, and other information respecting crimes and criminals.

It therefore seems clear that the North Carolina General Assembly intended for the Records Section to keep accurate and up-to-date records on all inmates to include photographs. All of the information concerning inmates, including photographs, can then be made available to local city and county law enforcement officials in a cooperative exchange program of information concerning all known law violators.

Robert Morgan, Attorney General
John. R. B. Matthis,
Assistant Attorney General

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19 December 1973

Subject: Juries-Jurors; Jury Commission, Method of
Selecting; Commission Has No Authority
to Disqualify Because of Mental or Physical
Infirmities

Requested by: Mr. J. C. Taylor,
Clerk of Superior Court
Halifax County

Question: Does a Jury Commission created under
Article 1 of Chapter 9 of the General
Statutes have the authority to permanently
disqualify from jury duty persons the
Commission finds have permanent physical
or mental infirmities?

Conclusion: No. The qualifications must be considered
by the Jury Commission each time a
person's name appears on the prospective
jury list for the ensuing biennium.

G.S. 9-6 contains the policy declared by the General Assembly that jury service is a solemn obligation of all qualified citizens, and excuses from this service should be granted only for reasons of compelling personal hardship or because service would be contrary to the public welfare, health or safety.

G.S. 9-6 provides the procedure for the judge to hear excuses and he shall excuse any person disqualified under G.S. 9-3.

G.S. 9-3 provides that all persons are qualified who are citizens of the State, residents of the county, have not served as jurors during

the preceding two years, who are 18 years old, who are physically and mentally competent, who have not been convicted of a felony or pled *nolo contendere* to a felony, and who have not been adjudged *non compos mentis*. Persons not qualified are subject to challenge for cause.

It is worthy of note that the county commissioners made up the jury list prior to the rewrite of Chapter 9 in 1967, and were required to select persons who were residents of the county, 21 years of age, of good moral character, having sufficient intelligence to serve. They excused from the list persons who had been convicted of a crime involving moral turpitude or who had been adjudged *non compos mentis*.

No such provisions now appear in Chapter 9 relating to the duty of the Jury Commission. However G.S. 9-2 requires the Jury Commission to prepare a list of prospective jurors *qualified under this Chapter*. In preparing the list for the ensuing biennium, the Jury Commission must include on the list those persons who are qualified under G.S. 9-3.

If the Jury Commission determines that a person is not physically and mentally competent to serve, or has been adjudged *non compos mentis*, such names need not be placed on the jury list for the biennium, but we find no authority to permanently disqualify such persons. Their qualifications to serve must be determined each time their name is considered for the prospective jury list. In cases of doubt, it would appear wise for the name to be included on the list since there is a procedure for the judge to excuse upon application, and the parties may challenge for cause.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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19 December 1973

Subject: Motor Vehicles; Operators' Licenses;
Nonresidents' Motorcycles

Requested by: Major Jack D. Cabe,
Executive Officer
North Carolina State Highway Patrol

Question: If a nonresident motorist holds a classified out-of-state driver's license requiring special endorsement to operate a motorcycle, and his license has not been so endorsed, is it a violation for him to operate a motorcycle in North Carolina?

Conclusion: Yes.

G.S. 20-7 and 20-8 state in pertinent part:

"§ 20-7. *Operators' and chauffeurs' licenses; expiration; examinations; fees.*--(a) Except as otherwise provided in G.S. 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Department under the provisions of this article. Except as otherwise provided in § 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has been first licensed as an operator or a chauffeur by the Department under the provisions of this article."

"§ 20-8. *Persons exempt from license.*--The following are exempt from license hereunder:

* * * *

- (3) A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this State only as an operator;
- (4) A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor

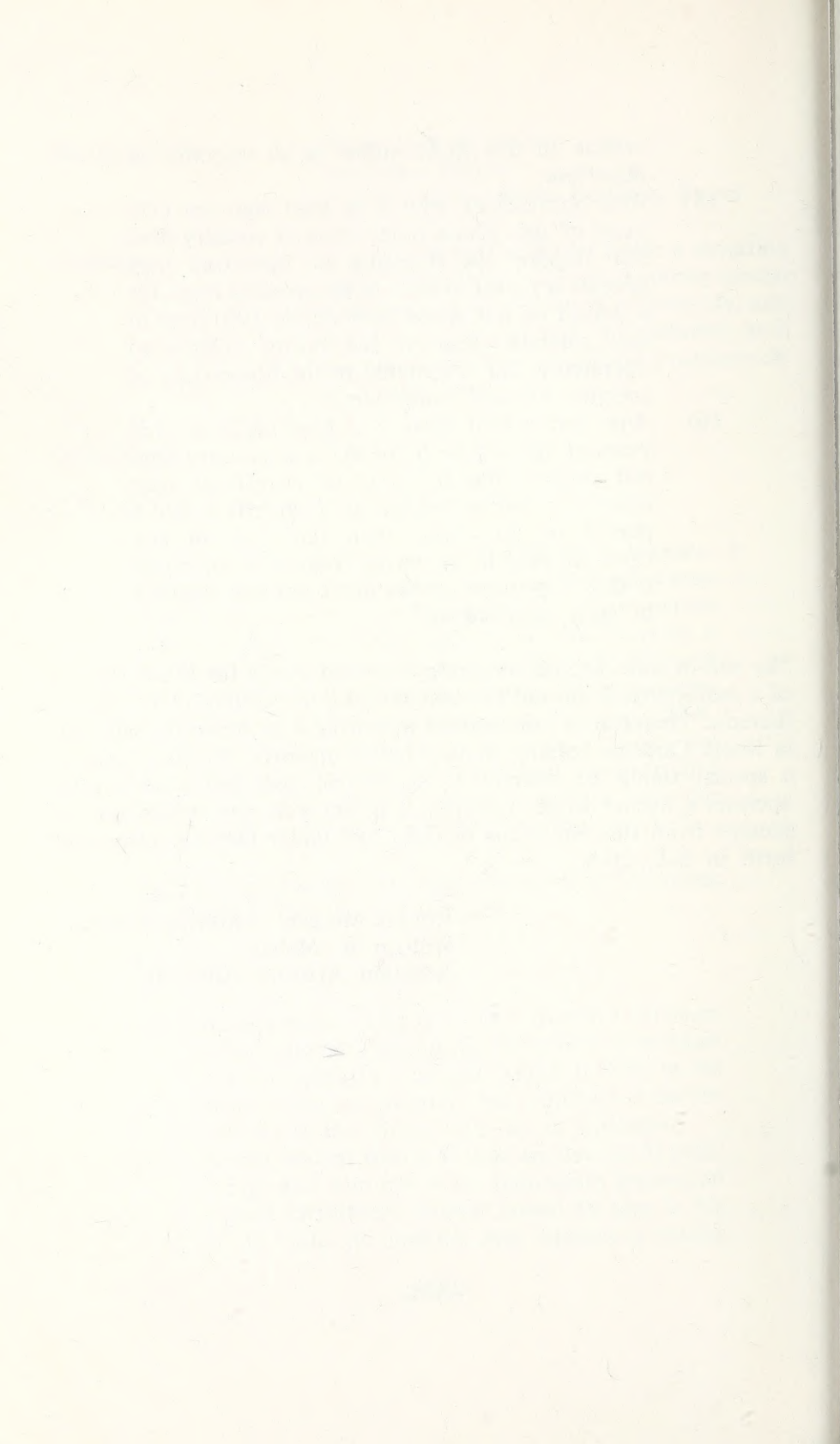
vehicle in this State either as an operator or chauffeur;

- (5) Any nonresident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such nonresident;
- (6) Any nonresident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of chauffeurs may operate a motor vehicle as a chauffeur for a period of not more than ten days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such nonresident."

The out-of-state license requiring a special stamp for the operation of a motorcycle is invalid for that purpose until such stamp appears thereon. Therefore a nonresident operating a motorcycle registered in North Carolina holding an out-of-state operator's license requiring a special stamp to operate a motorcycle does not hold a valid operator's license while operating a motorcycle and would not be exempt from the provisions of G.S. 20-7 under the exemptions set forth in G.S. 20-8.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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I N D E X T O A T T O R N E Y
G E N E R A L O P I N I O N S

Volume 43, Pamphlet 1

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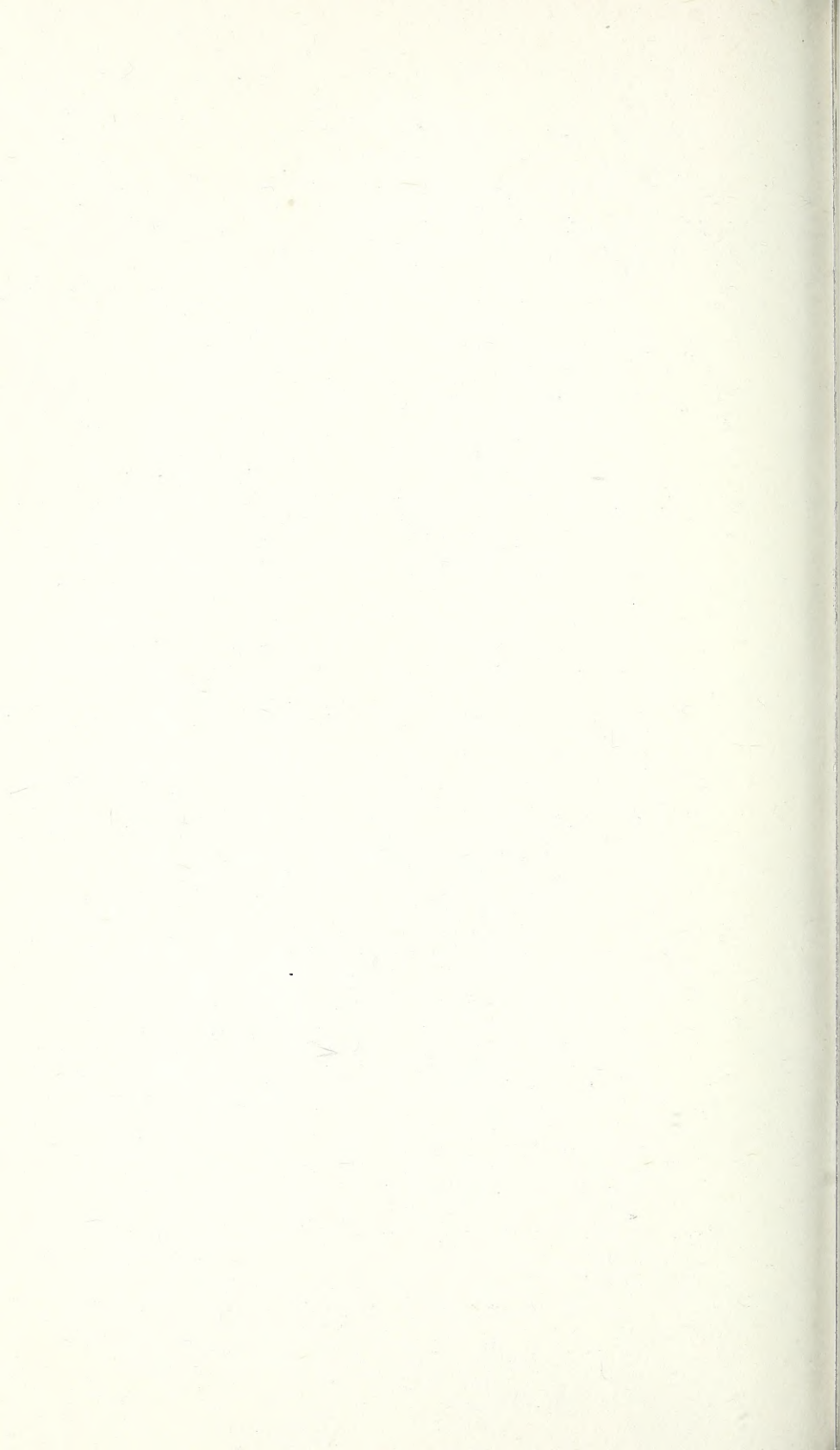




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ROBERT MORGAN
ATTORNEY GENERAL



NORTH CAROLINA
ATTORNEY GENERAL
REPORTS

Opinions of the Attorney General
January 1, 1974, through June 30, 1974

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2 January 1974

Subject: State Highway Patrol; Moving Expenses

Requested by: Captain G. D. Russell
North Carolina State Highway Patrol

Question: Is Section 5.118 of the State Budget Manual, which limits payment for moving expenses to 8,000 pounds, applicable to members of the State Highway Patrol moved for the convenience of the State?

Conclusion: No.

When a State Highway Patrolman is shifted from one point to another for the convenience of the State, the actual cost of transporting the household goods, furniture and personal apparel of the patrolman and members of his household should be paid by the State pursuant to the provisions of G.S. 20-192.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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2 January 1974

Subject: Social Services; Adoptions; Dismissal of Proceeding

Requested by: Dr. Renee Westcott,
Director
Department of Social Services

Question: May an adoption proceeding be dismissed by a filing of a notice of dismissal by the petitioner in accordance with G.S. 1A-1, Rule 41(a)(1) of the Rules of Civil

Procedure without the issuance of an order to dismiss by the court pursuant to G.S. 48-20?

Conclusion: An adoption proceeding may only be dismissed pursuant to an order to dismiss entered by the court under G.S. 48-20.

G.S. 1A-1, Rule 1 of the Rules of Civil Procedure states in part:

"These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute."

G.S. 48-20(a) states:

"If at any time between the filing of a petition and the issuance of the final order completing the adoption it is made known to the court that circumstances are such that the child should not be given in adoption to the petitioners, the court may dismiss the proceeding."

In *Branch v. Branch*, 282 N.C. 133, 191 S.E. 2d 671 (1972), the Supreme Court held that the provision of G.S. 50-10 permitting parties to file a request for a jury trial "prior to the call of the action for trial" in certain divorce actions prevailed over the language of G.S. 1A-1, Rule 38(b) of the Rules of Civil Procedure requiring demands for jury trial to be made "not later than 10 days after the service of the last pleading". Although the Court was primarily concerned with the effect of an amendment to G.S. 50-10, subsequent to the commencement of the action, which deleted the provision quoted above and substituted therefor that jury trial must be demanded "as provided in the Rules of Civil Procedure", the above conclusion was the cornerstone of the opinion.

In an opinion of this Office to Mr. Alton J. Knight, Clerk of Superior Court of Durham County, dated 30 January 1970, (40 N.C.A.G. 529), the provisions of 7A-225 which provided for a specialized procedure for execution of judgments rendered by a magistrate in

a small claim action were held to prevail over G.S. 1A-1, Rule 62 of the Rules of Civil Procedure which postponed execution on a judgment until the expiration of ten days after its entry. The opinion quoted the General Statutes Commission's commentary to Rule 1 that "In general, it can be said that to the extent a specialized procedure has heretofore governed, it will continue to do so". An opinion of this Office to Mr. James R. Sugg, Craven County Attorney, dated 17 May 1971, (41 N.C.A.G. 368), reached a similar conclusion.

The Supreme Court has stated in *In re Custody of Simpson*, 262 N.C. 206, 136 S.E. 2d 647 (1964), that "the only procedure for the adoption of minors is that prescribed by G.S. Chapter 48" (at p. 210). The phrase "circumstances are such that the child should not be given in adoption to the petitioners" in subsection (a) of G.S. 48-20 indicates legislative intent to provide for all occasions requiring dismissal of the petition. A decision by petitioners not to adopt the child is clearly such an occasion. Subsection (b) provides for a notice and hearing to enable the parties "to admit or refute the facts upon which the impending action of the court is based" and subsection (c) provides for the custody of the child upon dismissal of the proceeding. Although a decision by the petitioners to seek dismissal of the proceeding diminishes the importance of the hearing since dismissal would seem assured, the importance of the provisions for custody of the child remains unaffected.

Therefore, since G.S. 48-20 establishes "a differing procedure" for the dismissal of adoption proceedings, the provisions of G.S. 48-20 prevail over the Rules of Civil Procedure and determine the procedure for the dismissal of an adoption proceeding.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney

- - -

2 January 1974

Subject: Social Services; Liability of Parent for Expenses Incurred by Handicapped Child of Eighteen Years of Age or Older in Facility Owned or Operated by the Division of Mental Health; G.S. 50-13.8; G.S. 143-127.1; G.S. 14-322.2

Requested by: Dr. Renee Westcott, Director
Division of Social Services
Department of Human Resources

Question: Is a parent of a mentally or physically handicapped individual incapable of self-support who has attained the age of eighteen years liable for expenses incurred by said individual in a facility owned or operated by the Division of Mental Health?

Conclusion: A parent is not liable for the charges made by a facility owned or operated by the Division of Mental Health for the care, maintenance and treatment of a mentally or physically handicapped child incapable of self-support who has attained the age of eighteen years and who is a "long-term patient" in such a facility.

G.S. 50-13.8, entitled "Custody and support of persons incapable of self-support upon reaching majority," provides:

"For the purposes of custody and support, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support, provided that no parent may be held liable for the charges made by a facility owned or operated by the State Department of Mental Health (sic) for the care, maintenance and treatment of such person who is a

long-term patient." (Emphasis supplied)

G.S. 143-127.1, entitled "Parental liability for payment of cost of care for long-term patients in State Department of Mental Health (sic) facilities," provides, *inter alia*:

" * * * * *

(b) Parents or adoptive parents of a long-term patient in a facility owned or operated by the State Department of Mental Health (sic) *shall not be liable for any charges* made by such facility for treatment, care and maintenance of such a patient incurred or accrued subsequent to such patient attaining age 18.

(c) For purposes of this section, the term 'long-term patient' is defined as a person who has been a patient in a facility owned or operated by the State Department of Mental Health (sic) for a continuous period in excess of 120 days. No absence of a patient from the facility due to a temporary or trial visit shall be counted as interrupting the accrual of the 120 days herein required to attain the status of a long-term patient." (Emphasis supplied)

The 1973 amendment of the General Assembly substituted the age 18 for the age 21 at the end of subsection (b) to reflect the change effected in Chapter 48A abrogating the common law definition of "minor" as a person under the age of 21 years. See Chapter 775 of the 1973 N.C. Session Laws, Chapter 48A of the General Statutes of North Carolina and *State v. Jackson*, 280 N.C. 563, 187 S.E. 2d 27 (1972). Hence, under G.S. 50-13.8 and G.S. 143-127.1 no parent is to be held liable for the *charges* made by a facility owned or operated by the Division of Mental Health for the treatment, care and maintenance of a physically or mentally handicapped child who has attained the age of 18 years and is considered a "long-term patient."

However, G.S. 14-322.2 imposes a criminal sanction against any father or mother who wilfully fails and refuses "to provide *support* for a physically handicapped child or a mentally retarded child who

becomes 18 years of age and who is unable to be self-supporting . . . until such time as such dependent attains age 21 and is a patient in a facility owned or operated by the State Department of Mental Health (sic)." (Emphasis supplied) This statute appears to place an additional three years' support obligation, i.e., "until . . . such dependent attains age 21 . . .," on the parent of a physically or mentally handicapped child incapable of self-support irrespective of whether such child is a patient in a facility owned or operated by the Division of Mental Health.

Nonetheless, it should not be overlooked that the specific intent of the law respecting the support of handicapped children was "to limit the existing liability of all parents . . . in regard to charges made prior to the date of the ratification of this act, or to be made subsequent to such date, for treatment, care and maintenance of a natural or adopted child at facilities owned or operated by the State Department of Mental Health (sic)." See Section 4, Chapter 218 of the 1971 North Carolina Session Laws as amended by Chapter 1142 of the 1971 Session Laws.

Consequently, we submit that a specific exception was carved out of the general support obligation contained in G.S. 14-322.2 by the mandates of G.S. 50-13.8 and G.S. 143-127.1 explicitly exempting a parent from liability for *charges* made by a facility owned or operated by the Division of Mental Health for the treatment, care and maintenance of a physically or mentally handicapped child who has attained the age of 18 years and is considered a "long-term patient."

It should be noted that the amendment to G.S. 143-127.1 by the 1973 General Assembly has necessitated a different conclusion from the one contained in the opinion of the Attorney General to Mr. W. P. Johnston, Reimbursement Supervisor, North Carolina Department of Mental Health, 41 N.C.A.G. 662 (1971).

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

- - -

7 January 1974

Subject: Mental Health; Students; Psychological Services; Special Education; Parental Permission

Requested by: Mr. Bruce D. Steinbicker,
Administrative Officer
Smoky Mountain Mental Health Center

Questions: (1) May a mental health center staff member examine a child in school without parental consent?

(2) May a child be placed in a special education classroom without parental consent?

Conclusions: (1) A mental health center staff member may examine a child in school without parental consent where such examination is requested by the school superintendent.

(2) A child may be placed in a special education classroom with parental consent and such consent may be made a prerequisite to continued eligibility for public school instructions.

G.S. 115-150 authorizes the principal of a school to grade and classify pupils. G.S. 115-165 entitled "Children not entitled to attend public schools" provides in pertinent part as follows:

"A child so severely afflicted by mental, emotional or physical incapacities as to make it unlikely for such child to substantially profit by instruction given in the public schools shall not be permitted to attend the public schools of the State. When such child is presented for enrollment in a public school, it shall be the duty of the county or city superintendent of schools to have made the appropriate medical, social,

psychological and educational examination of the child to determine whether the child can profit from attending the public schools."

Chapter 115, Article 24, authorizes adoption of standard courses of study in the school system. G.S. 115-200 provides that there shall be organized and administered under the general supervision of the State Superintendent of Public Instruction a program of special courses for instruction for handicapped, crippled, and other classes of individuals requiring special types of instruction. This statute further provides eligibility for children who have been determined to be physically or mentally handicapped. G.S. 115-204 provides in pertinent part as follows:

"It shall be the duty of teachers and principals in connection with this program to screen and observe all pupils in order to detect signs and symptoms of deviation from normal, and to record and report the results of their findings in accordance with the established policies and procedures and upon blanks furnished for this purpose. The State Superintendent of Public Instruction, with the State Board of Health cooperating, shall make rules and regulations regarding screening and observation by teachers and for medical and psychiatric examination of pupils attending the public schools."

Absent contrary rules or regulations by the State Superintendent of Public Instruction/State Board of Health, in carrying out the duties imposed by the foregoing statutes, the superintendent of a city or county school system may require, as a condition to continued enrollment in the public school system, both medical and psychological or psychiatric examinations of any student. He may also require parental consent for placing a particular child in a special education classroom as a condition for continued enrollment. Further, a member of the staff of a mental health center may examine a child in school without parental consent when requested by the superintendent in carrying out the responsibilities imposed upon him by statute.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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7 January 1974

Subject: Administration of Estates; Administrators;
Liens; Payment of Debts; Priority

Requested by: Mr. Frankie Williams,
Clerk of Superior Court
Rockingham County

Question: Does the lien created by G.S. 143-126 take
priority over cost of administration of the
decedent's estate including ad valorem
taxes, widow's year's allowance,
administrator's commissions, attorney fees,
and court costs?

Conclusion: The lien created by G.S. 143-126 to secure
claim of the State of North Carolina for
unpaid bills of a person dying in an
institution does not have priority over cost
of administration, but falls within the
purview of G.S. 28-105, fourth class,
constituting dues to the State of North
Carolina.

Strictly speaking, a decedent's "debts" include only those which
he owes at the time of his death. Items such as funeral expenses,
cost of administration, estate and inheritance taxes do not constitute
debts of the decedent but are classified as debts by the debt-payment
statute and made a charge upon the assets in the hands of the
executor. See Wiggins, North Carolina Wills, Section 238. Funeral
expenses are now considered a debt of the estate by virtue of G.S.
28-107.1.

G.S. 28-105 specifies that debts of a decedent must be paid according to the classes therein listed. The first class is debts constituting a specific lien on property to an amount not exceeding the value of the property; the second, funeral expenses not exceeding a specified amount; the third, taxes on the estate of the deceased prior to his death; fourth, dues to the United States and to the State of North Carolina; fifth, judgments of a court of competent jurisdiction to the extent that they constitute a lien on property of the deceased at the time of his death; sixth, certain wages and medical service, drugs, etc., for a period not exceeding twelve months immediately prior to death; and seventh, all other debts and demands. Costs of administration are superior to claims of creditors. See Wiggins, North Carolina Wills, Section 250.

In addition, G.S. 28-170 specifically provides that executors, administrators, testamentary trustees, collectors or other personal representatives or fiduciaries shall be entitled to commissions which commissions shall be charged as a part of cost of administration and, upon allowance, *may be retained out of the assets of the estate* against creditors and all other persons claiming an interest in the estate. This may also include counsel fees. See G.S. 28-170.1. G.S. 7A-307 provides for uniform cost in administration of estates.

The Supreme Court of North Carolina in the case of *Parsons v. Leak*, 204 N.C. 86, 167 S.E. 563 (1933), held that commissions allowed executors and administrators for reasonable services rendered by them in the performance of their duties, and in proper instances including reasonable costs, charges and attorney fees necessary to the performance of their duties, under the provisions of C.S. 157 (now G.S. 28-170), could be retained by them out of the assets of the estate against the rights of creditors and all persons claiming an interest in the estate.

While G.S. 143-126 provides that the unpaid cost of care, treatment and maintenance of an inmate dying in any of the institutions specified in G.S. 143-117 shall be a first lien upon all property, both real and personal, of the decedent subject only to the payment of funeral expenses and taxes to the State, it was never intended to repeal G.S. 28-105. By the specific wording of this statute this *first lien* is subject to the second and third classes specified by G.S. 28-105 and is not a specific lien within the meaning of the first class.

This Office is of the opinion that priority of the lien created by G.S. 143-126 falls within the fourth class under G.S. 28-105 as dues to the State of North Carolina. This conclusion is bolstered by the language of the seventh class. A proper construction of G.S. 28-105 and G.S. 143-126 leads to the conclusion that the lien created by the latter has priority of payment over the fifth, sixth, and seventh classes.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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21 January 1974

Subject: Public Officers and Employees; Double Office Holding; Constitutional Law; Effect of Persons Holding More Offices Than Permitted Under Article VI, Section 9 of North Carolina Constitution and G.S. 128-1.1

Requested by: Mr. Bruce Wike, Chairman
Jackson County Board of Commissioners

Question: Where a person holds two offices as permitted under Article VI, Section 9 of the North Carolina Constitution and G. S. 128-1.1 and he assumes additional offices, does he vacate the first two offices held or is the assumption of the additional offices a nullity?

Conclusion: G. S. 128-2 provides that if any person presumes to hold office or place of trust or profit or is elected to a seat in either House of the General Assembly contrary to Article VI, Section 9 of the North Carolina Constitution, he shall forfeit all

rights and emoluments incident thereto.

Although a definitive answer cannot be given, in the absence of decisions by our Court construing Article VI, Section 9 of the Constitution and G. S. 128-1.1, it is the opinion of this Office that where a person holds legally two offices concurrently, pursuant to the Constitution and statute, his attempt to assume a third or additional office would be a nullity under G. S. 128-2, since the General Assembly has said he shall forfeit all rights and emoluments incident thereto.

Prior to July 1, 1971, the effective date of Article VI, Section 9 of the North Carolina Constitution and G. S. 128-1.1, there was no provision whereby one person could hold concurrently two public offices in this State.

The prior constitutional prohibition against double office holding was enforced in alternative ways depending on whether the first office was a State or federal office. In *Edwards v. Board of Education*, 235 N. C. 345, at 351, the North Carolina Supreme Court states:

"1. Where one holding a first office under the State violates Article XIV, section 7, of the North Carolina Constitution by accepting a second office under either the State or the United States without surrendering the first office, he automatically and instantly vacates the first office, and he does not thereafter act as either a *de jure* or a *de facto* officer in performing functions of the first office because he has neither right nor color of right to it. (Citations omitted)

"2. Where one holding a first office under the United States violates Article XIV, section 7, of the North Carolina Constitution by accepting a second office under the State without surrendering the first office, his attempt to qualify for the second office is absolutely void, and he does not act as either a *de jure* or a *de facto* officer in performing functions of the second office because he has neither right nor color of right to it."

Since our Supreme Court has not considered the effect of accepting a third office under the present provisions of Article VI, Section 9 of the Constitution and G. S. 128-1.1, we do not know which, if either, of the above rules would be applicable. The questions arise, if the first rule is applied, as to whether upon acceptance of the third office, the person vacates both of the first two offices or only one, and if only one, which of the first two would be vacated. Considering the provisions of G. S. 128-2, the Court may adopt the second rule above and hold that since the person presumes to hold an office contrary to Article VI, Section 9 of the North Carolina Constitution and since the General Assembly has stated he shall forfeit all rights and emoluments incident thereto, that the attempt to qualify for the third office is absolutely void and he does not act as either a *de jure* or a *de facto* officer in performing the functions of the third office because he has neither right nor color of right to it.

A public office is one where the duties of the incumbent of an office involve the exercise of some portion of the sovereign power, where the position has been created by the Constitution or statutes of the State or the power has been delegated to an inferior body to create the position in question.

Therefore, where a person presumes to hold more than two appointive offices contrary to Article VI, Section 9 of the North Carolina Constitution, it is suggested that he should resign the additional offices. Since it is not known what rules our Courts would apply to such a situation, it is further suggested that the appointing authority reappoint the person to the first two offices.

Robert Morgan, Attorney General
James F. Bullock
Deputy Attorney General

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22 January 1974

Subject: Municipal Corporations; Compensation of
Mayor and Members of City Council; G. S.
160A-64

Mrs. Arlene G. Talton
Clerk, Town of Mount Olive

At what time may the city council fix its own compensation and the compensation of the mayor?

G. S. 160A-64 provides that the city council may fix its own compensation and the compensation of the mayor and any other elected officials of the city by publication in and adoption of the annual budget ordinance. Thus any increase in the compensation of the council members and the mayor would not become effective until the annual budget ordinance became effective in which the compensation had been fixed. G. S. 159-8 provides that the budget ordinance of a unit of local government shall cover the fiscal year beginning July 1 and ending June 30.

Robert Morgan, Attorney General
James F. Bullock
Deputy Attorney General

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22 January 1974

Subject: Municipal Corporations; Board of Transportation; Traffic Regulations; State Highway System Streets; Restriction of Trucks to Inside Lane

Requested by: Mr. Billy Rose
State Highway Administrator

Question: Is a municipal ordinance which regulates and restricts truck traffic to the inside

traffic lane on a four-lane highway on the federal-aid State highway system in a municipality enforceable, when the ordinance has not been concurred in, nor has the erection of traffic signs on the highway implementing the ordinance been approved by the Board of Transportation?

Conclusion:

No. G. S. 20-169 specifically provides that all traffic signs and traffic control devices installed or erected on State highway system streets within municipalities are subject to the approval of the Board of Transportation, and it would be unenforceable as the erection of traffic signs is not authorized. There is also some question as to the validity of the ordinance as it may be in conflict with G. S. 20-150.1(1) and G. S. 20-146(b).

The Smithfield Board of Commissioners adopted an ordinance on November 6, 1973, restricting truck traffic in the Town of Smithfield on U. S. 70 to the center lane except when making right turns. The Board of Transportation was requested to concur in this ordinance and to install appropriate signs. The Traffic Engineering Department advises that the enforcement of the ordinance would create a traffic hazard. The State Highway Administrator by letter of November 29, 1973, requested an opinion as to whether or not the ordinance is enforceable without the concurrence of the Board of Transportation and the failure of the Board to approve the erection of appropriate signs.

Subject to the authority and control over streets on the State highway system vested in the Board of Transportation, a municipality may by ordinance prohibit, regulate, divert, control and limit vehicular traffic upon public streets of the city. G. S. 160A-296; G. S. 160A-300. G. S. 20-169 specifically provides that all traffic signs and traffic control devices installed or erected on streets on the State highway system within the corporate limits of a municipality are subject to the approval of the Board of Transportation. G. S. 136-18(19) grants to the Board of

Transportation authority to prohibit the erection of regulatory signs within the rights of way of federal-aid highways within the corporate limits of municipalities, unless such signs have been first approved by the Board of Transportation. The Board of Transportation has by policy originally adopted by the State Highway Commission on July 1, 1968, and readopted by the Board of Transportation on July 24, 1973, prohibited all traffic control devices and signs except those approved by the Board of Transportation. The ordinance applies only to one street and it is unenforceable in the absence of the approval of the Board of Transportation, as no signs or other traffic control devices are authorized to be placed on the State highway right of way to give notice to the public and to carry out the ordinance.

The validity of such an ordinance is questionable since it appears to be in conflict with G. S. 20-150.1(1) which permits vehicles to pass in the right lane, and G. S. 20-146(b), which requires slow moving vehicles to drive in the right lane. Municipal ordinances in conflict with State law are invalid and unenforceable. *State v. Stallings*, 189 N.C. 104.

Robert Morgan, Attorney General
Eugene A. Smith Assistant Attorney
General

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22 January 1974

Subject: Municipal Corporations; Special or Local Assessments; Petitions; Withdrawal of Name from Petition; Abandonment of Project by City.

Requested by: Mr. Archie L. Smith
City Attorney of Asheboro

Questions: (1) May signers of an original petition for street improvements withdraw their names from the petition after passage of

the assessment resolution?

(2) Must a city carry out an improvement once the assessment resolution has been adopted?

(3) May the city assess the property owners for expenses of a local improvement project which has been abandoned?

Conclusions:

- (1) No, in the absence of fraud.
- (2) No.
- (3) No.

The following factual material has been presented by the Asheboro City Attorney:

On 18 May 1973, a street improvement petition was filed with the Clerk of the City of Asheboro, requesting the installation of curb and gutter and hot bituminous surfacing on Shannon Road between Avondale and Greystone Road in the City. The petition provided that 100% of the costs of such improvements, exclusive of such costs incurred at street intersections, should be assessed against the property owners. The petition was signed by more than 50% of the property owners who also represented more than 50% of the lineal feet of frontage of the lands abutting upon the street to be improved. The City Clerk certified the sufficiency of the petition to the City Council on 7 June 1973 and on the same date the City Council adopted its preliminary resolution. The preliminary resolution provided for a public hearing to be held on 12 July 1973 and such hearing was in fact held after the required notice thereof and after a copy of the preliminary resolution was mailed to each of the owners of property subject to the assessment. No objections were raised at the public hearing and the City Council on 12 July 1973 adopted the assessment resolution directing that the project be undertaken. All of the foregoing procedural steps appear to have been regularly taken pursuant to Article 10, Chapter 160A of the General Statutes.

Certain preliminary work in connection with such improvements has

been done and the City has incurred certain engineering costs even though the actual construction of the improvements has not yet begun.

There has now been presented to the City Council a petition signed by several of the owners who signed the original petition, and several owners who did not, requesting that the original petition for improvements be withdrawn due to the excessive increase in the costs of doing the work. At a recent meeting of the City Council, several of the owners who signed the subsequent petition indicated that they were misled into signing the original petition as they were told that the costs would be much less than what the costs will in fact be. They did not contend that any such information was given them by City employees but instead by individuals who circulated the original petition. They now feel that the total costs will far exceed the costs as originally anticipated by them and they therefore do not desire for such improvements to be made. There has been no assertion, however, that such representations were fraudulent, or that any signatures were obtained through false representation. If withdrawal is accomplished by those who signed the original petition who have now signed the withdrawal petition, the original petition will lack sufficient signatories to permit the City to proceed with the improvements.

There are other owners who signed the original petition who desire that the work be completed, and that their respective properties be assessed as set out in the original petition.

Based upon the foregoing recitation of facts, these questions arise:

- (1) May signers of the original petition withdraw their names from the petition after passage of the assessment resolution?
- (2) Must the city carry out the improvement once the assessment resolution has been adopted?
- (3) May the city assess the property owners for expenses of a local improvement project which has been abandoned?

(1) Ordinarily, a person who has signed a petition may withdraw his signature, if he acts in due time, even though the result is to make the petition insufficient for want of the number of signers required by law. Our Court has said: "The signer of a petition has

made no commitment to his co-petitioners or to the administrative body. In this respect it has been held that his action in signing the petition is analagous to an offer which stands open until accepted... Furthermore, while the petitioners address the board in behalf of a public enterprise, the individual petitioner is dealing with a prospective burden upon his own pocketbook, or a lien upon his property—a very substantial right—and his privilege to withdraw before injury to others should be judged of in that relation." *Idol v. Hanes*, (1941) 219 N.C. 723, 726, 14 SE 2d 801.

However, there has to be some point in time after which a name may not be withdrawn. That time, in North Carolina, appears to be when "final action" has been taken on the petition:

"From considerations of public policy and individual right, we think the better rule is that the individual petitioner may, as of right, withdraw his name from the petition at any time before final action thereupon, and this rule we affirm. It should satisfy any reasonable requirement as to constancy of purpose, to be expected of those who deal with the courts and administrative bodies." *Idol v. Hanes*, supra.(p. 726)

G.S. 160A-217 requires a petition for local improvements to bear a sufficient number of names. Upon receipt of such a petition, a city council may adopt a preliminary resolution which, among other things, sets a time for a public hearing and contains a statement of intent to undertake the project. G.S. 160A-223. Following the hearing, the council *may* adopt a resolution, as was done in Asheboro on 12 July 1973, directing that the project be undertaken. G.S. 160A-225. It is our opinion that, prior to the adoption of that resolution, signatures to the petition may be withdrawn, but that adoption of the latter resolution is tantamount to the "final action" referred to in *Idol*, and thereafter no withdrawal may be effectively accomplished.

The foregoing is based upon the assumption, from the facts given, that fraud and false representations do not form an aspect of the case. There is authority in other jurisdictions to support withdrawal of names from a petition when fraudulent misrepresentations were involved. For example, see 70 *Am. Jur. 2d Special or Local*

Assessments, § 121; 21 ALR 2d 604, 624, § 11.

(2) Thus, we believe that the city may proceed with the project. But must it? Or, put another way, since those who signed the petition but who wish to withdraw cannot now do so, may those who signed the petition and who wish the project to continue insist upon its completion?

While a petition is *analogous* to an offer which may be withdrawn before accepted, it is not an offer *per se*, nor do we believe that once it is accepted, it becomes a contract between the city and the petitioners. Therefore, it does not involve vested rights with respect to the petitioners, and the resolution can be modified or rescinded altogether if conditions warrant that action. Although no North Carolina case law in point has been found, the law generally supports that conclusion:

"In accordance with the general rules relating to the abandonment of proceedings for an improvement, discussed *infra* § 1125, it is generally competent for the municipal governing body to repeal the ordinance or resolution ordering the improvement, and this it may do either in express terms or by clear implication..." 63 C.J.S. *Municipal Corporations*, § 1124.

However, where a person in reliance upon the action of the council has acquired or surrendered a valuable right (where a paving contractor has been awarded a paving contract, for example), the project may not be abandoned without making provision to compensate him for his loss. 63 C.J.S. *Municipal Corporations* § 1125.

Therefore, we believe that the city may, but cannot be required to, continue the project. By the same token, if due to greatly increased costs or other compelling reasons the council by resolution rescinds its prior action and abandons the project, the petitioners who still wish the project completed cannot insist upon its completion.

(3) Assuming, *arguendo*, that the project is abandoned, there is

authority to suggest that the preliminary expenses already incurred (engineering costs, for example) may be assessed against the affected property owners:

"Preliminary expenses of an improvement which after due study is abandoned or not undertaken can be assessed against property within the improvement district or area which, with proper authority, undertook the study. The assessment of such preliminary expenses need not be based upon special benefits accruing from a completed plan." 70 *Am. Jur.* 2d *Special or Local Assessments*, § 78.

However, we do not believe that the language of our statutes would permit that conclusion. The machinery for determining, assessing and collecting the costs incurred in the improvement is contained in G.S. 160A-226 *et. seq.* For example, G.S. 160A-226 provides: "When the project is *complete*, the council shall ascertain the total costs." (Emphasis added.) G.S. 160A-227 provides: "When the *total cost* of a project is determined, the council shall have a preliminary assessment roll prepared." (Emphasis added.) Thereafter, provision is made for a public hearing on the preliminary assessment roll, following which necessary corrections and revisions may be made, and after which the roll is confirmed and the assessment becomes a lien on the assessed property. G.S. 160A-228. It is difficult, if not impossible, to see how, under our statutes which require completion of a project to determine total cost which becomes the figure subject to assessment, a project might be abandoned and yet become assessable against the property owners. It is our opinion that, in case of abandonment, preliminary costs may not be recovered from the property owners but must be borne by the city, in view of the aforementioned statutes.

In summary, then, we believe under the facts presented, no petitioner may withdraw from the petition and neither may any petitioner insist upon completion of the project, but if the project is not completed, expenses incurred must be borne by the city and may not be assessed against property owners whose properties were affected by the project.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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23 January 1974

Subject: Pollution; State and Local Government Participation in the Federal Areawide Waste Treatment Program (Section 208, P.L. 92-500, Federal Water Pollution Control Act Amendments of 1972)

Requested by: Mr. James E. Harrington, Secretary
Department of Natural and Economic Resources

- Questions:
- (1) Who may identify substantial water quality control problem areas within the State?
 - (2) Who may designate the single planning agency for such an area?
 - (3) Would such a planning agency, if designated, have the authority to do all necessary planning throughout the area?
 - (4) Who may designate management agencies and is there authority to designate management agencies other than those in existence which would have all the necessary powers (including those relating to land use controls) required to implement an areawide waste treatment management plan?
 - (5) Do local governments have the authority to join together via cooperative

agreements to do the planning and implement any plan?

Conclusions:

(1) The Governor shall identify each area within the State which has substantial water quality control problems. Section 208(a)(2), P.L. 92-500.

(2) The Governor shall designate a single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans for such area. Section 208(a)(2)(B), P.L. 92-500.

(3) Yes, provided such agency meets the criteria set out in section 126.11 of the implementing regulations. (40 CFR 126.11, 38 F.R. 25682).

(4) The Governor, in consultation with the areawide planning agency (2) above, shall designate one or more waste treatment management agencies, which may be an existing or newly created local or regional political subdivision. Section 208(c)(1), P.L. 92-500. Cities and counties possess all the necessary powers required to implement an areawide waste treatment management plan within their respective jurisdictions. G. S. 160-Article 34A and G. S. 153-Article 24. If the problem area lies in two or more cities and/or counties, a metropolitan sewage district may be formed which would then possess all the necessary powers required to implement the plan. G. S. 162A-Article 5.

(5) Yes. G. S. 143-Article 21, Part 4; specifically, 143-215.40.

We understand the above questions were prompted by an inquiry from the U. S. Environmental Protection Agency (EPA) as to whether existing North Carolina legislation was sufficient to allow the State to participate in the Federal Areawide Waste Treatment Management Program established by Section 208, P.L. 92-500, Federal Water Pollution Control Act Amendments of 1972. As this is a Federal program, Section 208 is self-implementing with regard to identification of problem areas (Conclusion 1), designation of planning agencies (Conclusion 2) and designation of management agencies (Conclusion 4). These matters do not require any additional State authority. Only Conclusion 5 and that portion of Conclusion 4 pertaining to implementation of an areawide waste treatment management plan require State enabling legislation.

The current authority regarding sewage facilities vested in cities (G. S. 160-Article 34A), counties (G. S. 153-Article 24) and metropolitan sewage districts (G. S. 162A-Article 5) is sufficient to satisfy all the requirements of a management agency. Such entities possess all the necessary powers (including those relating to land use controls) required to implement an areawide waste treatment management plan (Conclusion 4). The Federal Water Resources Development Law of 1969 (G. S. 143-Article 21, Part 4), specifically G. S. 143-215.40, provides sufficient authority for local governments to adopt resolutions giving assurance to the Environmental Protection Agency regarding the development and implementation of any areawide waste treatment management plan. The 208 program falls within the "civil works projects" contemplated by the General Assembly (Conclusion 5).

As to Conclusion 3, no specific state legislation is required to enable a designated agency to merely develop a plan. P.L. 92-500 recognizes the distinction between developing and implementing a plan. Compare §208(a)(2) and §208(c)(1). However, the EPA regulations regarding criteria for designating agencies responsible for planning address the capability of the planning agency to implement the plan.* Evidently, EPA favors planning and management by the same agency, if practical. Strictly construed, this would limit planning to only those agencies which also would qualify as management agencies.

Accordingly, existing State authorizations are sufficient to allow full participation in the Federal Areawide Waste Treatment Management Program.

Robert Morgan, Attorney General
Theodore S. Farfaglia
Assistant to the Attorney General
Environmental Matters

*40 CFR 126.11(b)(4)(iv), 39 F.R. 25682.

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23 January 1974

Subject: Civil Defense; Preparedness Program
Established by a Joint Agency and
Designating Region L to Administer
Functions

Requested by: Mr. James W. Keel, Jr.
Nash County Attorney

Question: May the counties which make up Region
L Council of Governments, (which is
composed of Edgecombe, Nash, Halifax,
Northampton and Wilson counties)
together with the cities of Rocky Mount
and Wilson, create a joint agency for civil
defense and designate Region L to
administer its functions under authority
granted in G.S. 153-246?

Conclusion: The Region L Council of Governments may
establish a joint agency for civil defense
and designate Region L to administer its
functions under authority of G.S. 153-246.

G.S. 153-246 provides that any two or more counties which are
contiguous and when deemed to be in their best interest may enter

into written agreements for the joint performance of all administrative functions and activities of their local governments. The written agreement must set forth the functions or activities of the local government which are to be jointly carried on and must specify definitely the manner in which the expenses thereof will be appropriated and how any fees or revenues will be apportioned. These agreements must be ratified by the governing bodies of the counties subscribing thereto and must be spread upon their respective minutes. It provides that no such agreement shall be entered into for a period of more than two years but such agreements may be renewed for a period not exceeding two years at any one time.

It further provides that any municipality may enter into agreements with other municipalities within the county, or one or more municipalities may enter into agreements with the county in which located, to the end that the functions of local government may as far as practical be consolidated. Additionally, it is provided that the purpose of the section is to bring about efficiency and economy in local government through the consolidation of administrative agencies and that to effectuate this purpose the provisions of this section will be liberally construed.

In light of the foregoing statute it is our opinion that the question you propose must be answered in the affirmative. It must be pointed out, however, that any civil defense organization established under this provision must also comply with G.S. 166-8 which provides that civil defense organizations must be established "in accordance with the State Civil Defense Plan and Program". Any such proposed organization would therefore have exactly the same relationship with the State as any other local civil defense organization and would in no way be independent of the State's jurisdiction.

In giving this opinion we are not unaware of an opinion rendered by this Office on 22 October 1973 to Mr. David L. Britt, Department of Military and Veterans Affairs, concerning basically the same question. In that opinion we reached a different conclusion based upon the specific facts presented. There it was asked if "the Region L Council of Governments could establish a Regional Civil Defense Preparedness Program under Authority of G.S. 166-1 through 166-10; G.S. 160A-470 through G. S. 160A-478; and public law 85-606

amending Federal Civil Defense Act of 1950". In the question proposed in that query, no mention was made of the statute which is the authority for the answer to the question here presented.

However, in view of the clear language of G.S. 153-246 permitting counties and municipalities to join together and to designate a joint agency to administer functions of government for the purpose of efficiency and economy, our answer to your question must be made in the affirmative. In implementing such a program exact compliance with the statute is mandatory.

Robert Morgan, Attorney General
John R. B. Matthis,
Assistant Attorney General

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25 January 1974

Subject: Mental Health; Patients' Rights; Use of
Video Tapes of Alcoholic Patients in North
Carolina Treatment Facilities

Requested by: Mr. Billy K. Graham
Director
Cumberland County Mental Health Area

Questions: (1) Does the Patients' Rights Bill of 1973
(Article 3, Chapter 122, General Statutes of
North Carolina) prohibit making a video
tape of an alcoholic patient in a North
Carolina treatment facility without his
consent while he is inebriated or while he
is involved in a patient-therapist interview
for "reflective therapy" use in treatment
of the patient?

(2) If a video tape has been made of an
alcoholic patient in a North Carolina
treatment facility without his consent for

"reflective therapy" use in his treatment, does the Patients' Rights Bill (Article 3, Chapter 122, General Statutes of North Carolina) prohibit the film being shown to mental health professionals on the staff of the facility solely for training and diagnostic purposes?

Conclusions:

(1) The Patients' Rights Bill of 1973 (Article 3, Chapter 122, General Statutes of North Carolina) does not prohibit making a video tape of an alcoholic patient in a North Carolina treatment facility without his consent while he is inebriated or while he is involved in a patient-therapist interview for "reflective therapy" use in a treatment of the patient.

(2) If a video tape has been made of an alcoholic patient in a North Carolina treatment facility without his consent for "reflective therapy" use in his treatment, the Patients' Rights Bill (Article 3, Chapter 122, General Statutes of North Carolina) does not prohibit the film being shown to mental health professionals on the staff of the facility solely for training and diagnostic purposes.

The legislation enacted by the 1973 General Assembly designed to protect the rights of patients in North Carolina treatment facilities (codified as Article 3, Chapter 122, of the General Statutes) does not directly address the subject of video tapes of patients. Though experimental and controversial methods of treatment are specifically prohibited without the consent of the patient or his representative, this type of therapy would not appear to fall within those categories. Thus, the only pertinent portion of the Patients' Rights legislation dealing with this subject is found in the general policy language of G.S. 122-55.1:

"§122-55.1. *Declaration of policy on patients'*

rights.—It is the policy of North Carolina to insure to each patient of a treatment facility basic human rights. *These rights include the right to dignity, privacy, and humane care.* It is further the policy of the State that each treatment facility shall insure to each patient the right to live as normally as possible while receiving care and treatment." (Emphasis supplied)

As a result, the appropriateness of the filming contemplated and the use of the end product derived must be evaluated in the light of the right of the patient to privacy. For purposes of this opinion, it is assumed that the use of video tapes for diagnosis and treatment of an alcoholic is recognized by medical authorities as an integral, accepted and valuable part of the treatment program. Therefore, based upon this premise, if the responsible mental health professional deems it appropriate in the individual case to make a video tape and to use it for diagnosis and treatment purposes, then such actions would not result in improper invasion of the privacy of the patient.

As to the use of video tapes for training purposes, the particular situation involved must be carefully examined. Making a video tape of a patient without his consent solely for training purposes would appear to be unwise and injudicious, inasmuch as it would raise the specter of an indiscriminate invasion of the patient's privacy. However, use of the video tape for training would not appear to be improper in selected instances where (a) it was made initially for "reflective therapy" purposes as a part of the treatment program, (b) where it is to be used as a part of legitimate training of mental health professionals only, (c) where it actually contributes to the legitimate training of mental health professionals, and (d) where the anonymity of the patient is preserved insofar as is possible.

It is emphasized that the making, use and control of video tapes of this nature should be carefully monitored in order to preclude improper dissemination thereof resulting in embarrassment to the patient. Any failure to exercise adequate control over the video tapes or indiscriminate use of them might well subject the responsible personnel to claims or litigation based upon asserted undue invasion of the privacy of the patient involved.

Robert Morgan, Attorney General
William F. O'Connell,
Assistant Attorney General

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28 January 1974

Subject: Social Services; Legal Residence for Social Services Purposes; G.S. 153A-257; Legal Residence of Wife Committed to Mental Hospital

Requested by: Dr. Renee Westcott
Director
Division of Social Services
Department of Human Resources

Question: A wife residing in County A was committed to a State mental hospital in County B. Sometime during her subsequent 20-year hospitalization at this hospital, her husband moved and established a new residence in County C. The wife's discharge from hospitalization is now imminent.

(a) What is the wife's legal residence for Social Services purposes?

(b) Is a court having jurisdiction over a mental patient empowered to enter an order declaring the legal residence of that patient for Social Services purposes?

Conclusion: (a) The legal residence of the wife for Social Services purposes is County C.

- (b) A court having jurisdiction over a mental patient is empowered to enter an order declaring the legal residence of that patient for Social Services purposes.

G.S. 153-159 respecting the legal residence of the poor has been superseded by G.S. 153A-257 entitled "Legal Residence for Social Service Purposes". G.S. 153A-257 provides, *inter alia*:

- "(a) Legal residence in a county determines which county is responsible (i) for financial support of a needy person who meets the eligibility requirements for a public assistance or medical care program offered by the county or (ii) for other social services required by the person.

Legal residence in a county is determined as follows:

- (1) Except as modified below, a person has legal residence in the county in which he resides.
- (2) If a person is in a hospital, mental institution, nursing home, boarding home, confinement facility, or similar institution or facility, he does not, solely because of that fact, have legal residence in the county in which the institution or facility is located.

. . .

- (b) A legal residence continues until a new one is acquired, either within or outside this State. When a new legal residence is acquired, all former legal residences terminate.
- (c) This section is intended to replace the law defining 'legal settlement'. Therefore any general law or local act that refers to 'legal settlement'

is deemed to refer to this section and the rules contained herein."

Reading the common law rule that a woman, upon marriage, loses her own domicile and by operation of law acquires that of her husband (25 Am. Jur. 2d Domicile, Sec. 48) together with G.S. 153A-257, it is obvious at least that the wife does not have her legal residence in County B. It is equally apparent that at the time of her commitment to the State mental hospital the wife's legal residence was County A. Hence, the question becomes whether the subsequent action of the husband in moving his legal residence to County C also had the effect of shifting the wife's legal residence to that same county.

The common law created the fiction of a unitary matrimonial domicile whereby a female upon taking the marriage vows assumed *eo instante* the legal residence of her spouse and, further, that when the husband changed his legal residence, hers followed and was drawn to his. 24 Am. Jur. 2d, Divorce and Separation, Sec. 257. Although there have been myriad exceptions engrafted on this common law rule, it is nevertheless still a widely accepted legal precept. The exceptions which have been made to the rule have arisen out of situations in which the interests of the spouses are not identical, e.g., dissolution of marriage. *Rector v. Rector*, 4 N.C. App. 240, 166 S.E. 2d 492 (1969).

Thus it has been declared that a married woman may acquire a separate legal residence in "appropriate circumstances" or whenever it is necessary or proper that she should do so. 25 Am. Jur. 2d, Domicile, Sec. 53. Nonetheless, there is some authority for the proposition that although a wife is permanently separated from her husband "by mutual consent, separation agreement, or otherwise," she does not acquire a separate legal residence nor does she retain her husband's original legal residence when he changes it. 25. Am. Jur. 2d, Domicile, Sec. 55. In point of fact, it has been held that the legal residence of a wife adjudged insane and confined to an asylum follows that of her husband. *Gluc v. Klein*, 226 Mich. 175, 197 N. W. 691 (1924); 25 Am. Jur. 2d, Domicile, Sec. 56.

Accordingly, in the factual situation presented in this case since there

is no compelling or even logical reason why the common law rule should not apply, we are of the opinion that the wife's legal residence has become the same as that of her husband, County C. Consequently, pursuant to G.S. 153A-257 County C is responsible for the wife's social services needs if she meets the eligibility requirements therefor.

In the context of the case presented for consideration, it should be noted that G.S. 14-322 imposes criminal sanctions on a husband who wilfully abandons his wife without providing her with adequate support. We do not intimate, however, any opinion as to the applicability of this statute in this instance.

Finally, there are no provisions of the General Statutes precluding a district court having jurisdiction over a mental patient from entering an order declaring the legal residence of that patient for purposes of affording him the appropriate social services to which he is entitled. Indeed, it is incumbent upon the court in these circumstances to state the applicable law and where necessary its precise meaning in a given case. The type of factual situation presented here involves intricate legal questions patently ripe for judicial interpretation.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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29 January 1974

Subject: Social Services; Aid to the Aged and Disabled Liens; G.S. 108-29, *et seq.*; Effect of Repealing Act Upon Enforcement of Aid to the Aged and Disabled Liens Created Prior to the Effective Date of the Act

Requested by: Honorable Fred Folger, Jr.

Senator
North Carolina General Assembly

Question: Are the enforcement provisions of the repealed Aid to the Aged and Disabled Lien Law applicable to aid to the aged and disabled liens created prior to the effective date of the repealing act, *i.e.*, April 16, 1973?

Conclusion: The enforcement provisions of the repealed Aid to the Aged and Disabled Lien Law are still applicable to aid to the aged and disabled liens created prior to the effective date of the repealing act, April 16, 1973.

G.S. 108-29 provided for the creation of a "general claim and a lien . . . upon the real property of any person who receives assistance to the aged and disabled. The claim and the lien shall be for the total amount of assistance paid to such person from and after October 1, 1951, if the recipient receives assistance as an aged person, or October 1, 1963, if the recipient receives assistance as a permanently and totally disabled person."

Section 1 of Chapter 204 of the Session Laws of 1973 repealed the Aid to the Aged and Disabled Lien Law, *i.e.*, G.S. 108-29 through G.S. 108-37.1, with the following exception:

"Sec. 2. This act shall not apply to any claims and liens created pursuant to G.S. 108-29 prior to the effective date of this act, and *such claims and liens shall be entitled to full and complete enforcement as by law heretofore provided.*

"Sec. 3. This act shall become effective upon ratification.

"In the General Assembly read three times and ratified, this the 16th day of April, 1973." (Emphasis supplied)

It is quite apparent that the effect of Chapter 204 of the Session Laws of 1973 was prospective only in that the "claims and liens created pursuant to G.S. 108-29 prior to the effective date of this act," *i.e.*, April 16, 1973, remained unaltered and "entitled to full and complete enforcement as by law heretofore provided." The plain language of Section 2 of Chapter 204 evidences the obvious need to make provision for those claims and liens created pursuant to G.S. 108-29 prior to April 16, 1973. Accordingly, the law "heretofore provided" for the enforcement of aid to the aged and disabled liens is still applicable to effect the "full and complete enforcement" of those aid to the aged and disabled liens created prior to April 16, 1973. See 43 N.C.A.G. 249.

A contrary opinion on this question would result in myriad aid to the aged and disabled liens on county lien dockets without appropriate guidelines for their removal.

Robert Morgan, Attorney General
William Woodward Webb,
Associate Attorney

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31 January 1974

Subject: State Departments, Institutions and
Agencies; Environmental Policy Act; State
Art Museum Building Commission

Requested by: Mr. Thomas J. White
Chairman
State Art Museum Building Commission

Question: What are the duties of the Chairman of the
State Art Museum Building Commission
with respect to the filing of an
environmental impact statement under the
provisions of Chapter 113A of the General
Statutes in regard to the proposed
construction of a State Art Museum on the

property referred to as "Camp Polk" site?

Conclusion:

It is the duty of the Chairman to determine whether the proposed construction project is one "significantly affecting the quality of the environment of this State." G.S. 113A-4(2); G.S. 113A-9(4). If so, statement in conformity with guidelines for "Implementation of the Environmental Policy Act, 1971"(February 18, 1972) must be transmitted to the Clearinghouse and Information Center in the State Planning Division, Department of Administration. If not, no such statement need be filed.

G.S. 113A-9(4) defines "responsible State official" as the "Chairman" of the "State agency having primary statutory authority for specific programs, projects or actions subject to this Article."

Chapter 1142, Session Laws, 1967, Section 2(c) and (d) give the Commission authority for "location, design, construction, furnishing and equipping" of the building and the supervision thereof.

G. S. 113A-4(2) obviously contemplates a determination by the official whether the particular project is one "significantly affecting the quality of the environment of this State,. . . ."

This conclusion is supported by the guidelines issued February 18, 1972, which provide criteria to "be applied by the responsible state official in determining whether an impact statement is required."

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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1 February 1974

Subject: Labor; Minimum Wage; Effect of Deductions from Pay

Requested by: Honorable William C. Creel
Commissioner of Labor

Questions: (1) May the provisions of the Minimum Wage Act be waived by contract between an employer and an employee?

(2) Are deductions from an employee's pay which have the effect of reducing his effective rate of compensation below the minimum wage prescribed by G.S. 95-87 a violation of that statute?

Conclusions: (1) The provisions of the Minimum Wage Act may not be waived by contract.

(2) Absent a showing of theft or clear negligence on the part of an employee, deductions from an employee's wages to account for cash register or inventory shortages or other losses of or damage to property, which have the effect of reducing his effective rate of compensation below that prescribed by G.S. 95-87, are a violation of that statute.

It is apparently a practice by some employers to deduct amounts from their employee's wages to account for cash register and inventory shortages and other losses or damage to property. These deductions sometimes have the effect of reducing the employee's effective rate of compensation below that prescribed by the Minimum Wage Act, G.S. 95-85, *et seq.* Some of these deductions are made pursuant to a contract between the employer and employee; others are not. The questions presented are whether this practice is a violation of the Minimum Wage Act and whether a contract or agreement between the employer and employee permitting such a practice is of any effect.

No cases concerning these questions have arisen in this State and, as far as our research can determine, none have arisen under the minimum wage laws of any other state. This question, however, has arisen under the minimum wage provisions of the Fair Labor Standards Act. 28 U.S.C.A. 206. While the interpretation of the Federal Minimum Wage Law is not controlling, it is certainly worthy of consideration especially as the purpose and intent of the two acts is the same, i.e., to prevent groups of employees handicapped by a poor bargaining position from being paid substandard wages to the detriment of their health and well-being and the well-being of the nation or the state itself.

In *Mayhue's Super Liquor Stores v. Hodgson*, 464 F. 2d 1196 (5th Cir. 1972), the court considered the question of whether deductions from an employee's wages to account for cash register shortages which reduced the effective rate of compensation below the minimum wage was a violation of the Fair Labor Standards Act. The deductions in that situation were made pursuant to a contract which provided as follows:

"It is understood that the employee is responsible for any money entrusted to him. Any shortages that occur through misappropriation, theft, or otherwise, shall be voluntarily repaid by the employee to the employer. In executing this contract at the time of employment, it is understood by both parties that the employee is the sole and only person using or entering into the safe, cash deposit box, or sole operator of the cash register.

The employee agrees to voluntarily repay said missing funds to the employer within a reasonable period of time. The employer shall not deduct said shortages from the paycheck of the employee. It is understood that said shortages are considered to be a valid debt owed to the employer.

Any repaid debts caused by such shortages shall not be considered as part of the calculation of basic rates of employees and shall not be used to determine whether the employee has received pay amounting to less than the Federal Minimum Wage.

Basic rates, used for calculation of overtime pay, shall not be reduced as a result of repayment of such debts. Said debt repayment is, for all purposes, unconnected with payroll procedures and are not to be considered as payroll deductions."

If it is possible to write a contract to eliminate a possible conflict with the minimum wage law, it would seem that the contract considered by the court in *Mayhue* would accomplish that purpose. Yet the court in *Mayhue* determined that this contract was of no effect and that the right to a minimum wage cannot be waived by agreement between the employer and employee. In support of this conclusion, the court cited *Brooklyn Bank v. O'Neal*, 324 U.S. 697 (1945). In that case, the United States Supreme Court determined that the rights conferred upon employees by the Fair Labor Standards Act cannot be waived by agreement and said:

"It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver of release contravenes the statutory policy. (Citing cases) Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."

From this it clearly appears that a contractual agreement which has the effect of reducing an employee's rate of compensation below the minimum wage prescribed by statute is void, of no effect and not a waiver of any right conferred by the minimum wage law. If such a waiver cannot be accomplished by contract, it necessarily follows that any unilateral action by an employer which has the effect of reducing an employee's rate of compensation below the minimum wage is also void and a violation of the minimum wage law.

Having determined that the right to the minimum wage prescribed by statute cannot be waived by contract, we now turn to the question of whether deductions for cash register shortages, inventory

shortages and other losses or damage to equipment or property of the employer, which, in effect, reduce the rate of compensation below the minimum wage prescribed by statute, are unlawful. As noted above, the question of cash register shortages was specifically considered by the court in *Mayhue*.

The court determined that the direct deduction of cash register shortages from an employee's compensation or making such shortages a debt owed the employer by the employee (see contract quoted above) so as to reduce the effective rate of compensation below the minimum wage was a violation of the law and, in practice, tended to shift an expected part of the employer's business expense to the employee. The court specifically said:

"With the employee's financial picture burdened with the valid debt of the shortages, he is receiving less for his services than the wage that is paid to him. Whether he pays the valid debt of his wages or other resources, his effective rate of pay is reduced by the amount of such debts. When it is reduced below the required minimum wage, the law is violated. . . .

We agree with the Secretary that this agreement tended to shift part of the employer's business expense to the employees and was illegal to the extent that it reduced an employee's wages below the statutory minimum. This amounts to nothing more than an agreement to waive the minimum wage requirements of the Fair Labor Standards Act. Such an agreement is invalid."

In making this determination, the court noted that where there was evidence that the shortages resulted from theft, its decision would be different. The court explained this distinction as follows:

"There is no evidence that *Mayhue's* shortages were the result of theft on the part of the cashiers or were in any way different from the usual losses which are to be expected where cashier employees handle a large number of transactions. The agreement required repayment regardless of the reason for the shortages.

If the agreement required only repayment of money that the employee himself took or misappropriated it obviously would not collide with the Act. As a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of monies taken in excess of the money paid to the employee in wages would not reduce the amount of his wages. This case is distinguishable from the situation where the employee has taken some money, has had the use of it, and is required to return it. In such a case there would be no violation of the Act because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum."

While not directly expressed in *Mayhue*, it would seem that the basic premise of that decision is that deductions to cover *unexplained* cash register shortages, inventory shortages or other losses or damage to property or equipment are contrary to the purpose and intent of the Minimum Wage Law. With that premise, this Office agrees. It is our opinion that it is a violation of the Minimum Wage Law to deduct amounts from an employee's wages to account for cash register shortages, inventory shortages and other losses or damage to property or equipment when that deduction reduces the effective rate of compensation below that prescribed in G.S. 95-87, absent a showing that the shortage or loss resulted from employee theft or negligence. Specifically in regard to cash register shortages and inventory shortages, it is our opinion that these are to be expected in the normal operation of a business, are ordinarily caused by employee inefficiency rather than theft, and should not be deducted so as to reduce an employee's wages below the minimum wage absent a showing of theft or clear negligence. In regard to other unexplained losses or damage to property or equipment, it is also our opinion that deductions should not be made so as to reduce the rate of compensation below the minimum wage unless the employee responsible for the loss or damage can be identified and that loss or damage shown to have resulted from his negligence.

You will note that this opinion applies only where the deduction reduces the effective rate of compensation below the minimum wage.

It may be argued, and there may be some merit to such argument, that it is unfair or inequitable to not apply these rules where the deductions do not reduce the effective rate of compensation below the minimum wage. The premise upon which this opinion is founded, however, is that the legislature has determined that it is not in the interest of an employee or the State to pay him less than a specified minimum wage. That premise is absent where the deduction does not reduce the effective rate of compensation below the minimum wage.

It would seem that the resolution of the problems in this area must be made on a case by case basis. To assist you in making such determinations, I might suggest that you consider the adoption of rules and regulations pursuant to your rule-making authority set forth in G.S. 95-4(2). The rules and regulations established by the U.S. Department of Justice are found in 29 CFR 531, *et seq.*

Robert Morgan, Attorney General
Edwin M. Speas, Jr.
Assistant Attorney General

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4 February 1974

Subject: Counties; Public Officers; Filling Vacancies
in Office of County Commissioner;
Applicability of G.S. 153A-27

Requested by: Mr. Edward H. McCormick
Harnett County Attorney

Question: Where an appointment was made on June 4, 1973 to fill a vacancy on the county board of commissioners for an unexpired term to expire in 1976, is such person required to run in the 1974 general election pursuant to G.S. 153A-27, which becomes effective February 1, 1974?

Conclusion: No. The person appointed in June of 1973

to fill the unexpired term under old G.S. 153-6 continues to serve the unexpired term and is not required to run for election in the 1974 general election.

G.S. 153-6, relating to the filling of vacancies on the board of county commissioners, as it existed in June 1973, did not specify for what term the person appointed to fill the vacancy was to serve. However, the Attorney General's Office has ruled, based upon the well-established principle of law that where a statute does not specify for what term the person appointed to fill the vacancy should serve, that he is to serve for the unexpired portion of the term.

G.S. 153A-27, which becomes effective February 1, 1974, contains provisions whereby a person appointed to fill a vacancy on the board of county commissioners would serve for the remainder of the unexpired term if the member being replaced was serving a two-year term or was in the last two years of a four or six-year term. Otherwise the person appointed to fill the vacancy serves until the first Monday in December next following the first general election which is held more than 30 days after the day the vacancy occurs and at that general election a person shall be elected to the seat vacated either to the remainder of the unexpired term or if the term has expired, to a full term.

Chapter 822, Session Laws of 1973, which rewrote Chapter 153 of the General Statutes, being codified as Chapter 153A of the General Statutes, did not make its provisions retroactive.

Section 9 of Chapter 822 specifically provides that no provision of this act is intended nor may any provision be construed to affect in any way a right or interest, public or private, now vested or accrued in whole or in part, the validity of which might be sustained or preserved by reference to a provision of law repealed by this act. G.S. 153A-2 provides that the provisions of this Chapter, insofar as they are the same in substance as laws in effect as of December 31, 1973, are intended to continue those laws in effect and not to be new enactments. The provisions of this Chapter do not affect any act heretofore done, any liability incurred, any right accrued or vested.

Thus it is clear that, since Chapter 153A of the General Statutes, as enacted by Chapter 822, Session Laws of 1973, is not made retroactive, and since Chapter 822 specifically indicates that no provision of the act is intended nor may be construed to affect in any way a right or interest vested or accrued, the person appointed to fill the vacancy on the board of commissioners on June 4, 1973, continues to serve for the unexpired term and no person is to be elected in the November 1974 election to fill that vacancy.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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6 February 1974

Subject: Counties; County Commissioners; Power to
Expend Certain A.B.C. Funds; Purposes for
Which Such Funds May Be Expended

Requested by: Mr. R. Patterson Webb
Assistant Director for Administration
Division of Mental Health Services

Questions: (1) Are county commissioners authorized to
expend the five cents per bottle surcharge
imposed by G.S. 18A-15(3) for purchase or
lease of existing facilities for education,
research, treatment or rehabilitation of
alcoholics?

(2) Are county commissioners authorized
to expend the five cents per bottle
surcharge imposed by G.S. 18A-15(3) for
construction of facilities for education,
research, treatment or rehabilitation of
alcoholics?

Conclusions: (1) County commissioners are not
authorized to expend the five cents per

bottle surcharge imposed by G.S. 18A-15(3) for purchase or lease of existing facilities and property for education, research, treatment, or rehabilitation of alcoholics.

(2) County commissioners are authorized to expend the five cents per bottle surcharge imposed by G.S. 18A-15(3) for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics.

G.S. 18A-15 levies the sum of five cents per bottle on every bottle of alcoholic beverage sold in A.B.C. stores and provides for the remitting of such funds to the county commissioners of the county in which such funds were collected. This statute further specifies how such funds are to be spent in the following language:

" . . . which remittances shall be spent in the discretion of the county commissioners only for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics."

The statute is clear and in no manner ambiguous. Under its terms, such funds may be spent only for construction, maintenance and operation of facilities. No provision is made for the purchase or lease of existing facilities and property; hence, the foregoing conclusions.

Robert Morgan, Attorney General
Parks H. Icenhour,
Assistant Attorney General

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15 February 1974

Subject: Motor Vehicles; Size, Weight and Construction; Size of Vehicles and Loads; Allowing Chicken Feathers to Blow from

Unloaded Vehicle onto Highway

Requested by:

Mr. Broxie Nelson
Raleigh City Attorney

Question:

Does the 1971 proviso, "Provided this section shall not be applicable to or in any manner restrict the transportation of poultry or livestock", to G.S. 20-116(g) relating to the securing of loads on vehicles apply to the transportation of empty, unloaded poultry containers as well as to the actual transportation of poultry and livestock?

Conclusion:

No.

By an opinion of December 1967 to the Honorable James A. Graham, this Office advised that if a person wilfully permitted or allowed chicken feathers to blow from his vehicle onto the highway, he was in violation of G.S. 20-116(g). As a result of this interpretation of G.S. 20-116(g), the statute was amended in 1971 to read in part: ". . . Provided this section shall not be applicable to or in any manner restrict the transportation of poultry or livestock". This amendment was necessary since poultry and livestock must have ventilation while being transported to prevent suffocation and overheating which may result in shipping fever, etc. Therefore, it was impossible to insure that feathers and animal refuse would not blow or sift from the vehicle hauling such poultry or livestock.

It would be unreasonable to assume, however, that the General Assembly by the aforesaid amendment intended that, after unloading, an operator could remove all the covers from his vehicle and let the forced air from his forward movement clean his vehicle of loose feathers and animal refuse while in route, thus littering the highways of this State as well as the land of those persons fronting on a highway.

It is our opinion that the General Assembly in passing the aforesaid amendment only intended to facilitate the moving of poultry and livestock and not to give a license to carriers to litter the highways,

it not being unreasonable to require such carriers to blow or flush out their vehicles after unloading and before returning to the highway.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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15 February 1974

Subject: Mental Health; Courts; Involuntary
Commitment to Private Hospital

Requested by: Mr. R. Patterson Webb
Assistant Director
Division of Mental Health Services

Question: May a district court involuntarily commit
an individual to a private hospital for the
mentally ill?

Conclusion: A district court may not involuntarily
commit an individual to a private hospital
for the mentally ill.

This question arises from an apparent conflict between the provisions of the involuntary commitment statutes enacted by the 1973 General Assembly and other previously enacted portions of Chapter 122 of the General Statutes. While all existing statutes should be reconciled if it is possible, three major considerations must, of necessity, determine applicability of any individual section of the current Chapter 122: (a) The new involuntary commitment statutes (G.S. 122-58.1 through G.S. 122-58.8) represent the latest and controlling expressions of legislative intent; (b) the highest court of this State, in effect, has declared the previous involuntary commitment statutes to be unconstitutional without particularizing as to what specific portions rendered them so; and (c) the 1973 involuntary commitment statutes removed the clerk of court (who had been a key figure in commitment proceedings) from any judicial role in the involuntary commitment proceedings.

With these basic factors in mind, the language of G.S. 122-58.3 to the effect that a person may be involuntarily committed "only" as provided therein becomes highly significant. That section, as well as G.S. 122-58.6 which deals with the authority of the district court, speaks only of commitment to a "treatment facility". The term "treatment facility" is defined in G.S. 122-58.2 and a private hospital for the mentally ill is not included within the definition. Any premise that the failure of G.S. 122-58.6 to include provision for commitment to a private hospital resulted from legislative oversight is negated by the authorization that section vests in the court to direct outpatient treatment at a private facility under certain conditions.

Also indicative of legislative intent is the language in the Patients' Rights Bill. This legislation which was enacted by the 1973 General Assembly and is more or less concomitant with the new involuntary commitment statutes also only guarantees rights to patients in a "treatment facility". See G.S. 122-36(g). From all of these indicia, it is obvious that no authority is vested in the district court to commit an individual to a private hospital pursuant to involuntary commitment statutes under Article 5A, Chapter 122.

Of course, it cannot be overlooked that Article 10, Chapter 132, Private Hospitals for the Mentally Disordered has not been repealed and that the portions thereof not absolutely in conflict with the later legislation or with the decision of the North Carolina Supreme Court are still valid. Looking to this Article, it would appear that G.S. 122-79 which seeks to authorize the clerk of superior court to order individuals into commitment is no longer valid.

However, G.S. 122-80—which permits the Department of Human Resources to transfer a patient to a private hospital from a treatment facility to which he has been involuntarily committed—is not incompatible with the later statutes or the court decision. Thus, such transfers by the Department, or by the subordinate Division of Mental Health Services upon proper delegation, are authorized under the conditions described in the statute.

Further, it would appear that the provisions of G.S. 122-75, G.S. 122-77 and G.S. 122-78 still contain valid provisos in appropriate situations. These sections contain language authorizing the superior

court to approve placement of an individual who has been found to be mentally ill in a private hospital for the mentally disordered. However, G.S. 177-75 strictly limits this authority to situations where the "person shall be found to be mentally ill in the mode hereinbefore prescribed." Thus, it would appear that the provisions of G.S. 177-75, G.S. 177-77 and G.S. 177-78 would only come into play after commitment action in the district court has already been completed and a determination has been made that the individual is mentally ill.

Finally, it would appear to be within the authority of any court having jurisdiction over an involuntary commitment proceeding to permit an individual to voluntarily admit himself to a private hospital in lieu of involuntary commitment to a treatment facility.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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20 February 1974

Subject: Divorce; Merits of the Action may be
Considered Upon Filing of Answer

Requested by: Honorable Charles B. Deane, Jr.
Senator, 17th District

Question: Is a district court judge required to wait
until the expiration of a thirty-day period
after service of summons before
considering the merits of a divorce action
even though the defendant has filed his
answer?

Conclusion: A district court judge may consider the
merits of a divorce action immediately
after the filing of the defendant's answer.

G.S. 1A-1, Rule 12(a)(1) provides, in part, that "A defendant shall

serve his answer within 30 days after service of the summons and complaint upon him." If a defendant should file his answer in a divorce action before the expiration of the thirty-day period, this provision does not prohibit a district court judge from considering the merits before the expiration of the period. There is also no provision in Chapter 50 of the General Statutes, entitled Divorce and Alimony, which would prevent the judge from considering the merits before the expiration of the period.

Therefore, a district court judge may consider the merits of a divorce action immediately after the filing of the defendant's answer even though the thirty-day period permitted the defendant for filing his answer has not expired.

Robert Morgan, Attorney General
Robert R. Reilly,
Associate Attorney General

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20 February 1974

Subject: Child Abuse Reporting Law; G.S. 110-115
through G.S. 110-122 (effective July 1,
1971)

Requested by: Mr. James F. Lane
Director
Medical Staff Services
The N. C. Memorial Hospital

Questions: (1) In a case where a mother brought her
eight-year-old daughter in for an
examination to the emergency room of
N. C. Memorial Hospital on the basis of
alleged rape, what evidence must be
present in order to require reporting under
the Child Abuse Reporting Law?

(2) Who is accountable for reporting under
the Child Abuse Reporting Law in this case

where the magistrate refused to issue a warrant for rape on the grounds that he needed the results of the requested medical examination?

Conclusions:

(1) Professional persons as defined in G.S. 110-117(5) must report suspected child abuse or neglect when they have a reasonable cause to suspect it. Others must report child abuse when they have actual knowledge of the situation.

A report of abuse or neglect must include such information as the reporter knows, including the child's name and address, the name and address of his parents or other caretakers, his age, his whereabouts if he does not live at home, the nature and extent of his injury or condition resulting from the alleged abuse or neglect, and any other information the reporter believes would be helpful in establishing the cause of the injuries or the condition resulting from abuse or neglect. If the reporter is a professional person as defined by the law, the report (whether oral or written) must include his professional opinion as to the nature, extent, and causes of the injuries or the nature, extent, and causes of the condition resulting from abuse or neglect.

(2) In general, the thrust of the law is to encourage all persons to assume responsibility for protecting children by reporting child abuse and neglect. Designated professionals are given a higher duty to report cases of child abuse or neglect than others.

There has been no judicial interpretation of the so-called Child Abuse Reporting Law of 1971. The definition of an "abused child" under

G.S. 110-117 reads as follows:

"(1) 'Abused child' means a child less than 16 years of age whose parent or other person responsible for his care:

- a. Inflicts or allows to be inflicted upon such child a physical injury by other than accidental means, which causes or creates a substantial risk of death or disfigurement or impairment of physical health or loss or impairment of function of any bodily organ, or
- b. Creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or disfigurement or impairment of physical health or loss or impairment of the function of any bodily organ, or
- c. Commits or allows to be committed any sex act upon a child in violation of law."

This definition does not specifically refer to abuse other than by a parent or other persons responsible for the child's care. Therefore, a literal interpretation would appear to exclude a requirement for reporting under G.S. 110-115 in the present factual situation where a 16-year-old boy who was not the parent or responsible for the care of the 8-year-old girl victim committed the alleged child abuse; nor was it shown that the alleged child abuse was allowed by a parent or a person responsible for the care of the child. However, another very important aspect of this particular factual situation is that rape was alleged and rape being a crime ought to be reported to the law enforcement authorities.

Therefore, it would have been prudent for the representative to make a complete inquiry and examination and report the alleged rape to the law enforcement authorities and to the director of the County Social Services Department, because of the higher duty imposed on "professional persons" to report even "suspected" abuse. A reasonable cause to suspect is all that is required of the professional who is in the position of a quasi-expert rendering an opinion based

on reason and logic rather than mere speculation or rumor. The definition of "professional person" under G.S. 110-117 reads as follows:

"(5) 'Professional person' means a physician, surgeon, dentist, osteopath, optometrist, chiropractor, podiatrist, physician-resident, intern, a registered or practical nurse, hospital administrator, Christian Science practitioner, medical examiner, coroner, social worker, law-enforcement officer, or a school teacher, principal, school attendance counselor or other professional personnel in a public or private school."

The change in procedures and policies outlined in the last paragraph of the inquiry letter on the first page and continuing at the top of the second page reflects the suggestions made in this opinion for a more prudent approach, which would be in compliance with the Child Abuse Reporting Law of 1971.

Robert Morgan, Attorney General
Raymond W. Dew, Jr.
Assistant Attorney General

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20 February 1974

Subject: Tort Claims Act; Bridle Trails in Pilot Mountain State Park; Liability of State and Private Concessionaires

Requested by: Mr. William A. Webster
Chief of Operations
Division of State Parks
N. C. Department of Natural and Economic Resources

Questions: (1) If the State were to operate bridle trails across a five-mile corridor through Pilot Mountain State Park, what would be its liability to people who bring in their own or rented horses and ride such trails?

(2) What would constitute the State's maintaining the bridle trails in a "safe and reasonable manner?"

(3) In terms of liability what would be the position of a private concessionaire who rented horses outside the Pilot Mountain State Park and let the public use the Pilot Mountain State Park bridle trails?

(4) What should the State require of such a concessionaire in terms of liability coverage?

Conclusions:

(1) The State would have no liability in maintaining the proposed bridle trails within the Pilot Mountain State Park except under the provisions of N.C.G.S. 143-291 through N.C.G.S. 143-300.1 of the Tort Claims Act.

(2) A "safe and reasonable manner" is a question of prudence and logic depending on the situation in each instance.

(3) The private concessionaire would be liable for its own acts of negligence.

(4) The State should require private concessionaires to carry Owners, Landlords and Tenants liability insurance.

Chapter 143 of the North Carolina General Statutes entitled "State Departments, Institutions, and Commissions" under Article 31 entitled "Tort Claims against State Departments and Agencies", is known popularly as the Tort Claims Act. In essence this Act waives the sovereign immunity of the State and its agencies to the extent that a person injured by the actionable negligence of an employee of a State agency, while acting in the course of his employment, can recover up to a statutory limit of \$20,000 in damages.

Even though a person has a right of recovery under the Act there are exceptions:

(a) There can be no recovery for negligent omissions of a State employee;

(b) There can be no recovery for intentional acts of State employees;

(c) There can be no recovery if the claimant is contributorily negligent.

Thus, for an example of exception (a) above, recovery cannot be had for injuries resulting from the negligent failure or omission of the responsible employees of the State Highway Commission to repair a hole in a State highway. (See *Flynn, Administratrix, v. N.C. State Highway and Public Works Commission*, 244 N.C. 617.)

Maintaining the bridle trails in a safe and reasonable manner would be more a matter of commission rather than omission. Accordingly, the State employees involved in the project should be certain there were no dangerous or hazardous obstructions or traps on the bridle trails as a result of an employee's action in developing them.

As an example of exception (b) above, no recovery can be had for the intentional shooting of plaintiff's decedent by a State Highway patrolman since the Tort Claims Act does not permit recovery for wrongful and intentional injuries but limits recovery to negligent acts. (See *Jenkins v. N.C. Department of Motor Vehicles*, 244 N.C. 560.)

As an example of exception (c) above, plaintiff being struck by a bullet fired by a State University Officer was held contributorily negligent as a matter of law in joining a crowd that was attempting illegally to enter a gymnasium and therefore plaintiff was not awarded damages. (See *Braswell v. University*, 5 N.C. App. 1.)

Therefore, in summary, in order for a person to recover damages under the Tort Claims Act there must be (1) a negligent act (2) on the part of a State employee (3) while acting in the course of

his employment. (See *Mackey v. State Highway Commission*, 4 N.C. App. 630.)

Owners, Landlords and Tenants liability insurance for adequate limits determined by the experience and recommendations of the insurance carrier should be required of the concessionaire, since any negligence on the part of such concessionaire would not be the responsibility of the State and therefore not within the purview of the Tort Claims Act.

Robert Morgan, Attorney General
Raymond W. Dew, Jr.
Assistant Attorney General

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5 March 1974

Subject: Municipalities; Ambulance Services;
Requirement for Certified Attendant

Requested by: Mr. J. Troy Smith, Jr.
Havelock City Attorney

Question: Is an ambulance operated by a volunteer fire department, which exists by virtue of a resolution of a municipality, required to have a driver plus one person in attendance possessing an ambulance attendant's certificate from the Department of Human Resources when on an emergency mission?

Conclusion: Absent excepting regulations by the Department of Human Resources, an ambulance operated by a volunteer fire department existing by virtue of a resolution by a municipality is required to have a driver plus one person in attendance possessing an ambulance attendant's certificate from the Department of Human Resources when on an emergency mission.

G.S. 130-233(a) is as follows:

"Every ambulance, except those specifically excluded from the operation of this Article, when operated on an emergency mission in this State shall be occupied by the driver plus at least one person who possesses a valid ambulance attendant's certificate from the Department of Human Resources. The Department, with the approval of the Emergency Medical Services Advisory Council, shall adopt regulations setting forth exemptions to this requirement applicable to situations where exemptions are considered by the Department to be in the public interest."

G. S. 130-234 in pertinent part reads:

"The following are exempted from the operation of the provisions of this article:

. . . .

- (5) Vehicles owned and operated by rescue squads chartered by the State of North Carolina as nonprofit corporations or associations or by rescue squads authorized by G.S. 160-191.11 which are not regularly used to transport sick, injured, wounded or otherwise incapacitated or helpless persons except as a part of rescue operations are excluded."

The volunteer fire department, which has under its auspices the rescue squad, is neither a nonprofit corporation nor association chartered by the State of North Carolina inasmuch as it exists by virtue of a resolution of the city board. G.S. 160-191.11 was repealed by Chapter 698 of the 1971 Sessions Law. It thus appears that the operation of the rescue squad does not fall within the exemption of G.S. 130-234(5). No exemption is contained in G.S. 160A-487 which authorizes a municipality to appropriate funds to rescue squads to enable them to purchase and maintain rescue equipment and to finance operation of such squads. However, the Department of Human Resources is authorized to adopt regulations exempting

from the requirements of G.S. 130-233(a) situations considered by the Department to be in the public interest.

This Office is of the opinion that, absent exempting regulations by the Department of Human Resources, an ambulance operating on an emergency mission by a volunteer fire department organized by virtue of a resolution of the city board is required to have a driver plus one person possessing an ambulance attendant's certificate from the Department of Human Resources in such ambulance.

Robert Morgan, Attorney General
Parks H. Icenhour
Assistant Attorney General

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5 March 1974

Subject: Probation; Necessity of Probation
Violation Report and Capias Issued by the
Court in Order to Toll the Period of
Probation.

Requested by: Mr. A. F. Sigmon, Jr.
Probation Training Supervisor
Department of Social Rehabilitation and
Control

Question: Must a Probation Violation Report be
presented to the Court and a capias issued
by the court in order to toll the period
of probation, or will the fact that the
probationer has been arrested and charged
with an offense automatically toll the
period of probation?

Conclusion: It is mandatory that a Probation Violation
Report be presented to the court and a
capias be issued by the court in order to
toll the period of probation. The mere fact
that the probationer has been arrested and

charged with an offense does not automatically toll the period of probation.

The statute referred to contains the following:

"§15-200. *Termination of probation, arrest, subsequent disposition.*—

. . . At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant.

. . . Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence. If at any time during the period of probation or suspension of sentence a warrant is issued and the defendant is arrested for a violation of any of the conditions of probation or suspension of sentence, or in the event any person is arrested at the instance of a probation officer, the defendant shall be allowed to give bond pending a hearing before the judge of the court, . . . "

In *State v. Pelley*, 221 N.C. 487, 20 S.E.2d 850, judgment was entered against the defendant on 18 February 1935, sentencing him to prison. The prison sentence was suspended and defendant was placed on probation for a period of five years on certain conditions. On 19 October 1939, before the end of the five-year probation period, a capias was issued by the court and returned marked, "(d)ue search made and defendant not to be found in Buncombe County or in the State of North Carolina." Defendant was subsequently arrested on 10 February 1940 in Washington, D.C., upon an alias-capias issued by the North Carolina courts. He fought extradition and was not brought before the North Carolina superior court on the matter of revocation of his probation until January 1942, which was almost

two years after the expiration of his probationary period. The superior court, after hearing evidence in the case, found the defendant had violated conditions of his probation and ordered the probation revoked and the prison sentence put into effect. On appeal, the court affirmed, stating (p. 498):

"The failure to enter judgment within the five-year period, prescribed in the original judgment, was not due to the lack of diligence on the part of the court, but was chargeable solely to the conduct of defendant. Therefore, we hold that the court had not lost jurisdiction of the defendant by reason of the lapse of time and that the court had power to enter judgment at January Term, 1942, of the Superior Court of Buncombe County."

State v. Pelley, supra, is therefore clear authority that if a probation violation warrant and order of arrest are issued by the court during the probationary period, a valid probation revocation hearing may be held and an order entered after the period of probation has expired, at least in those situations where the delay is not due to any lack of diligence on the part of the probation authorities or the court.

In *State v. Best*, 10 N.C. App. 62, the defendant was tried on November 10, 1962, and sentenced to a prison term of not less than two nor more than three years. However, the prison sentence was suspended and defendant was placed on probation for a period of three years with the usual conditions of probation being imposed, including that the defendant report to the probation officer as directed and that he not move his place of residence without written consent of the probation officer. On November 5, 1969, five days before the three-year period of probation was to expire, the superior court judge, acting on a report of the probation officer that the defendant had wilfully violated certain conditions of the probation judgment, ordered a probation violation warrant to be issued for defendant's arrest. The capias was issued and delivered to the sheriff for service, who on 6 November 1969 returned it unserved with the notation: "Though diligently sought, defendant could not be found in this county. He is believed to be Unknown."

On May 6, 1970, the probation officer again filed a report with the court alleging that defendant, during the three-year probationary period, had violated the terms and conditions of the probation judgment in several designated respects, including the allegation that defendant had moved his place of residence without consent of the probation officer. On the same day that the probation officer filed his report he also, pursuant to G.S. 15-200.1, gave defendant, who was in jail on a different matter, a copy of the Probation Violation Report and notified him in writing of his intention to pray the court to revoke defendant's probation and put the suspended sentence in effect.

The defendant argued during the probation violation hearing that G.S. 15-200 requires that a warrant not only be issued but that it be actually served on him and that he be taken into custody during the probationary period or else the court would lack power to hear the matter. The court held that such a construction would reward a defaulting probationer for his skill in eluding the officers and that the warrant need not be served so long as it was issued before the expiration of the probationary period. The court stated (p 65) that:

"In our opinion, G.S. 15-200 authorizes issuance of a probation violation warrant at any time during the period of probation; it does not require that the defendant be apprehended and brought into court for hearing within that time."

It is, therefore, our opinion that in order to toll the period of probation, a Probation Violation Report must be presented to the court and a capias must be issued by the court before the expiration of the period of probation. However, the probation hearing may be conducted after the expiration of the probationary period. The mere fact that the probationer has been arrested and charged with the commission of an offense does not in and of itself toll the period of probation.

Robert Morgan, Attorney General
John R. B. Matthis
Assistant Attorney General

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6 March 1974

Subject: Corporations; Hospital Service
Corporations; Courts; Attorney Fees;
Authority to Allow Under G.S. 6-21.1

Requested by: Mr. Bobby H. Griffin
Union County Attorney

Question: Would G.S. 6-21.1 which allows attorney fees in certain actions against insurance companies be applicable to a hospital service corporation organized pursuant to G.S. 57-1?

Conclusion: Yes.

Under G.S. 6-21.1, where an action for personal injury or property damage or suit against an insurance company under a policy issued by the defendant insurance company has been instituted in a court of record, and the amount of the recovery is \$2,000 or less, the presiding judge may, in his discretion, allow reasonable attorney fees upon a finding by the court that there was an unwarranted refusal by the insurance company to pay the claim which constitutes the basis of the suit. The legislative intent was to discourage unwarranted refusals by insurance companies to pay valid claims.

G.S. 57-1 provides that corporations organized pursuant to its provisions "shall be exempt from all other provisions of the insurance laws of this State. . . ." Chapter 57 refers specifically to the insurance laws of this State which are codified in Chapter 58 of the General Statutes. In construing a statute, it will be presumed that the legislature comprehended the import of the words employed by it to express its intent. Accordingly, technical terms must ordinarily be given their technical connotation in the

interpretation of a statute. But where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or definitely indicated by the context.

G.S. 57-1 was enacted for the purpose of creating a specific type of insurance corporation which would be exempt from the insurance laws codified in Chapter 58.

To form any other interpretation of G.S. 57-1 would be to allow such corporations created pursuant to its provisions to avoid all the other laws of North Carolina except those specifically mentioned within Chapter 57. Thus, it is obvious that the legislative intent was not to give Chapter 57 corporations an immunity so that they might make unwarranted refusals to pay valid claims.

Chapter 6 of the General Statutes does not come within the classification of insurance law as codified in Chapter 58; therefore, G.S. 57-1 would not exempt corporations formed pursuant to Chapters 57 and 58 provisions from the mandates of G.S. 6-21.1.

Robert Morgan, Attorney General
E. Thomas Maddox, Jr.
Associate Attorney

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11 March 1974

Subject: Statutes; Preemption or Implied Repeal of
Article 13A of Chapter 130; Agricultural
Labor Camps; Minimum Standards
Therefor

Requested by: Mr. Ben Eaton
Special Assistant to the Director
Division of Health Services
Department of Human Resources

Question: Has Article 13A of Chapter 130 of the
General Statutes been preempted by the

Occupational Safety and Health Act of 1970 or impliedly repealed by the Occupational Safety and Health Act of North Carolina?

Conclusion: Article 13A has neither been preempted nor impliedly repealed.

The United States Congress enacted the Occupational Safety and Health Act of 1970 (OSHA) on December 29, 1970. Pursuant to authority conferred in Section 6(a) of the Act (29 U.S.C. 655(a)), the Secretary of Labor approved the establishment of a new Part 1910 to Title 29 of the Code of Federal Regulations. 29 C.F.R. 1910 contains occupational safety and health standards; section 142 thereof pertains to temporary labor camps. The General Assembly of North Carolina enacted the Occupational Safety and Health Act of North Carolina (OSHANC), codified as G.S. 95-126 through G.S. 95-155, on the 1st of May, 1973. Pursuant to Section 6(a) (G.S. 95-131(a)) and Section 31 of OSHANC, 20 C.F.R. 1910 became effective as a regulation of the State Commissioner of Labor on the 1st of July, 1973, after the Commissioner filed the same with the North Carolina Secretary of State on the 29th of June, 1973.

Section 18(a) of the Federal Act (29 U.S.C. 667(a)) provides:

"Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 6."

The effect of this provision is to preempt State law in areas where a federal standard is in effect. See *Columbus Coated Fabrics v The Industrial Commission of Ohio*, Civil No. 73-419 (S.D. Ohio; October 19, 1973). However, Section 18(b) of the Act (29 U.S.C. 667(b)) authorizes any state to assume responsibility for development and enforcement of standards by the submission of a state plan. As pointed out in *Columbus Coated Fabrics, supra*, "One of the primary purposes of the (Federal) Act was to encourage if not force states to adopt new laws and regulations by imposing federal standards on them unless they adopted an approved plan which satisfied

minimum federal standards." The State of North Carolina adopted an approved plan by filing 20 C.F.R. 1910 with the Secretary of State. By that act, 20 C.F.R. 1910 became "in all respects the . . . regulations of the Commissioner of this State." (G.S. 95-131(a)). 20 C.F.R. 1910 is now a State regulation; therefore, preemption is inapplicable.

Article 13A of Chapter 130 of the General Statutes was enacted as Chapter 809 of the 1963 Session Laws. Article 13A provides minimum health standards for agricultural labor camps. When OSHANC was enacted as Chapter 295 of the 1973 Session Laws, it contained neither a general repealer clause nor any reference to Article 13A. The Supreme Court has stated in *Person v Garrett*, 280 N.C. 163, 184 S.E. 2d 873 (1971) that:

"The intent of the Legislature controls the interpretation of a statute. (Citations omitted) A statute is not deemed to be repealed merely by the enactment of another statute on the same subject. The later statute on the same subject does not repeal the earlier if both can stand, or where they are cumulative, and the court will give effect to statutes covering the same subject matter where they are not absolutely irreconcilable and when no purpose of repeal is clearly indicated. (Citation omitted) Repeal of statutes by implication is not favored in this jurisdiction. (Citations omitted)" (at 165-166)

OSHANC is applicable to all employers and employees except those excluded in G.S. 95-128 and, by the adoption of 20 C.F.R. 1910, provides specific standards for temporary labor camps. Article 13A, besides providing minimum standards, requires the issuance of a permit certifying that the minimum standards have been satisfied before occupancy of housing facilities by the workers and their families. It also entrusts the responsibility for enforcement of the Article in the Department of Human Resources which has expertise in sanitary and health matters. There is no irreconcilable conflict between OSHANC and Article 13A; instead, Article 13A complements the objectives of OSHANC. Consequently, there is no implied repeal of Article 13A by OSHANC. The Department of Human Resources retains the responsibility to enforce Article 13A

and the Director of the Office of Occupational Safety and Health has the responsibility to insure that the standards contained in 29 C.F.R. 1910.142 are satisfied.

OSHANC provides that the Commissioner of Labor may accept the services of other State agencies and that agents may be authorized to inspect and investigate temporary labor camps. See G.S. 95-133(a) and G.S. 95-136(a). G.S. 130-11(4) authorizes the administrative staff of the Department of Human Resources:

"To make sanitary and health investigations and inspections authorized by this Chapter or by regulations prepared pursuant to said Chapter or authorized by other applicable provisions of law under the direction of the Department of Human Resources, including the making of such investigations and inspections in cooperation with local health departments."

Consequently, the Commissioner or Director may arrange with the Department of Human Resources for the latter to make sanitary and health investigations and inspections and thereby to assist the enforcement of OSHANC standards.

Similarly, the Employment Service Division of the Employment Security Commission, which is required by 20 C.F.R. 620 to ascertain that housing facilities intended for migrant laborers who have been recruited by the Division satisfies applicable State laws and regulations or the standards set forth in the regulation, whichever is more stringent, may cooperate with the Department of Human Resources and the Office of Occupational Safety and Health in order to insure compliance with 20 C.F.R. 620.

Robert Morgan, Attorney General
Robert R. Reilly
Associate Attorney

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15 March 1974

Subject: State Departments, Institutions, and Agencies; Youth Development Schools; Discontinuance of Farming Operations and Utilization of Funds Appropriated for Purposes of Farming Operations in Other Aspects of the Youth Development Program.

Requested by: Mr. James Peeler Smith
Senior Administrative Assistant
Department of Social Rehabilitation and Control

Questions: (1) May the farming operations at the Youth Development Schools be discontinued?

(2) What procedures must be followed in order to discontinue such farming operations?

(3) May the Department of Youth Development utilize the funds appropriated for purposes of the farming operation in other aspects of the Youth Development Program?

Conclusions: (1) The State Department of Youth Development may discontinue farming operations at Youth Development Schools if a determination is made that such discontinuance will best promote the interest of the delinquent boys and girls committed to the care of such schools.

(2) The State Department of Youth Development must make a determination that the discontinuance of the farming operation is in the best interest of the

delinquent boys and girls committed to the school's care. Once this determination is made, the discontinuance of the farming operation at the school would be handled in the same manner as any other management problem connected with the Youth Development Schools.

(3) Funds appropriated for purposes of farming operations in the Youth Development Schools may be transferred and utilized in other aspects of the Youth Development Program if such a request is made in writing by the head of the spending agency and such request is approved by the Director of the Budget.

Chapter 134 of the General Statutes of North Carolina created the State Department of Youth Development, defined its powers and duties and generally described how various Youth Development Schools in North Carolina would be operated.

G. S. 134-2 provides that the State Department of Youth Development shall be the governing body of the seven (7) Youth Development Schools in North Carolina. It provides, *inter alia*, that "The Department shall be responsible for the management of the said schools and institutions and the distribution of appropriations for the maintenance, permanent enlargement and repair thereof, subject to the provisions of the Executive Budget Act, . . . The State Department of Youth Development shall administer said schools and institutions in such a manner as to best promote the interest of the delinquent boys and girls committed to its care and the said Board may transfer individual students from one school to another but may not authorize the consolidation or abandonment of any of the said schools. The said Department shall retain possession and administrative control over the physical assets of the said schools and institutions together with all lands, buildings, improvements and properties appertaining thereto and it is authorized and empowered to do all things reasonably necessary in connection therewith for the care, supervision and training of the boys and girls of all races committed to its care."

It, therefore, seems clear that the State Department of Youth Development has absolute management and administrative control of all the Youth Development Schools in North Carolina and, as such, the Department has the authority to discontinue farming operations if a determination is made that such discontinuance is in the best interest of the boys and girls committed to the care of the schools.

The discontinuance of the farming operation at the Youth Development Schools would be done in the same manner that any other management problem is handled. That is, the assets and properties no longer needed in the farming operations would be disposed of as other assets and properties which are in excess of State needs.

G. S. 143-23 provides in part that "Transfers or changes as between objects and items in the budget of any department, institution or other spending agency, may be made at the request in writing of the head of such department, institution or other spending agency by the Director of the Budget." In order to utilize the funds appropriated for purposes of the farming operation in other aspects of the Youth Development Program, it will therefore be necessary to make a request in writing to the Director of the Budget and to get prior approval for such transfers.

Robert Morgan, Attorney General
John R. B. Matthis Assistant
Attorney General

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25 March 1974

Subject: Taxation; Real Estate Excise Stamp Tax;
Conveyances; Exclusions; Leases; G.S.
105-228.29

Requested by: Mr. Lucius M. Cheshire
County Attorney
Orange County

Question: Where landowner A conveys unimproved realty to B for a term of fifty years and B conveys all of his right, title, and interest in the property to C, are real estate excise tax stamps required on the conveyance from B to C?

Conclusion: The conveyance from B to C is not subject to the real estate excise stamp tax on conveyances, being a conveyance of B's interest in a lease for a term of years, exempt from the tax under G.S. 105-228.29.

A, the owner of property in fee, leases such unimproved realty to B for a term of fifty years. B constructs substantial improvements upon the property. B subsequently sells all of its right, title and interest in the property to C. Would the conveyance from B to C be subject to the real estate excise tax? Upon the facts stated, we think not.

G.S. 105-228.29 provides in part:

"The provisions of this Article shall not apply to transfers of an interest in real estate . . . by lease for a term of years . . ."

B possessed a lease for a term of years, which is a chattel real. *Bragg Investment Company v. Cumberland County*, 245 N.C. 492, 96 S.E. 2d 341 (1956). B could convey no more than its interest in the leasehold, which was the lease for a term of years. Therefore, C cannot take any greater interest in the property than B had. Since all B owns is a lease for a term of years, this is the only interest which B could subsequently convey and this would be true no matter what the value of the improvements placed upon such real estate during the term of the lease. Such interest is not subject to the tax, pursuant to the express provisions of G.S. 105-228.29.

Robert Morgan, Attorney General
Norman L. Sloan,
Associate Attorney

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25 March 1974

Subject: State Departments, Institutions and Agencies; Board of Transportation; Streets and Highways; Use of Right of Way for Garbage Collection Sites

Requested by: Mr. Billy Rose
State Highway Administrator

Question: May the Board of Transportation authorize counties to use State highway right of way easements for the construction and maintenance of garbage collection sites to serve homes and industries?

Conclusion: No. The use of highway right of way easements for the establishment and maintenance of garbage collection facilities by counties is not a recognized purpose for which the Board of Transportation may permit State highway right of way easements to be subjected. *

The Board of Transportation has received requests from counties for the placing of containers on State highway right of way to be used in connection with the operation of garbage collection facilities which serve homes and industries primarily in the rural areas. The containers most widely used are known as "Dempster Dumpsters". These containers are left on sites to be filled with garbage. Each container is then picked up by a truck equipped with a hydraulic lift. The contents of the container are dumped into the truck and the container is replaced on the site. The maintenance of garbage collection facilities by the county to serve homes and industries is not to be confused with the maintenance of trash containers located on highway rights of way by the Board of Transportation for use by the traveling public.

Generally, the interest acquired in land by a public agency for highway purposes is held in trust for the benefit of all the public, regardless of whether the corporation owns the fee or an easement.

25 Am. Jur. Highways ¶133; 39 Am. Jur. 2d Highways ¶159, page 134; *Elizabeth City v. Banks*, 150 N.C. 407; *State v. Railroad*, 147 N. C. 428. A public use is not necessarily a street use and even though a structure is devoted strictly to a public use and it is a great benefit and convenience to the citizens, unless it is public travel in one of its authorized forms that is benefited and made convenient, it cannot be lawfully erected. *Hildebrand v. Telephone Company*, 219 N.C. 402; Nichols, *Eminent Domain* ¶10.6. Where an easement is acquired, the condemnor's right of use is limited to legitimate street or highway purposes and the ownership is said to be in trust for public use generally for transit only. 30 C.J.S. *Eminent Domain* ¶451, Page 648.

The public is entitled to the unobstructed and uninterrupted use of the entire width of highways and streets, except insofar as the public authority or abutting owners are permitted to encroach upon the primary public right to a limited extent or for a temporary purpose. 39 Am. Jur. 2d Highways ¶273. The power to authorize the use of highways for a special purpose or in a special manner is vested in and controlled by the legislature. Where such power has been delegated, the power is measured by the statute or charter provision delegating such authority. 39 Am. Jur. 2d Highways §214; *Elizabeth City v. Banks*, 150 N.C. 407; 64 C.J.S. Municipal Corporations ¶1719, at page 136. The Board of Transportation has by statute been authorized to grant permissive use of the right of way for certain non-highway purposes. G.S. 136-18(10) authorizes the Board of Transportation to make reasonable rules and regulations for placing or erecting of telephone, telegraph or other poles, sign poles, fences, gas, water, sewage, oil, or other pipelines, and other similar obstructions upon the right of way. Legislative authority permitting such obstructions or encroachments should be express or clearly implied, and strictly construed. 39 Am. Jur. 2d Highways §276.

It is the opinion of this Office that G.S. 136-18(10) does not authorize the Board of Transportation to subject the highway right of way easement to the use by the counties for the purpose of locating garbage collection facilities; neither has any other statute been discovered which would authorize the use of easements for State highway rights of way for such a purpose.

G.S. 136-93 makes it a misdemeanor to cause any interference, to make any opening, or to place any structure on the State highway right of way without first obtaining permission from the Board of Transportation. This is a criminal statute and does not grant any additional authority to the Board of Transportation to subject the highways to uses not otherwise authorized by law.

G.S. 14-399 makes it a misdemeanor to place trash or garbage on the right of way of any public highway, unless it is "placed in a designated location or container for removal by a specific garbage or trash service collector." This statute exempts from criminal liability persons placing such trash or garbage in a designated container, but the statute does not grant any authority to the Board of Transportation for the placement of garbage collection facilities to serve homes and industries.

G. S. 153-9(67) authorizes counties to enact ordinances governing the removal and the manner of disposing or dumping of trash and garbage in rural areas. G.S. 153-9(67) and G.S. 160A-303.1 authorize ordinances by counties and municipalities which make it unlawful to place trash and garbage upon a street or highway unless such trash or garbage is "placed in a designated location or container for removal by a specific garbage or trash service collector." It is the opinion of this Office that neither of these statutes grant authority for the Board of Transportation to permit garbage collection facilities, as described, on State highway rights of way.

Robert Morgan, Attorney General
Eugene A. Smith
Assistant Attorney General

- * The foregoing opinion was modified by Chapter 1381 of the 1973 Session Laws (2nd Session, 1974) effective April 12, 1974, which specifically authorizes the Board of Transportation to permit the location of garbage collection containers on noncontrolled access State highway rights of way, in accordance with Rules and Regulations of the Board of Transportation, and with written permission of the underlying fee owner.

11 April 1974

Subject: Social Services; Mental Health; Involuntary
Commitment of a Gravely Disabled Person
to a Rest Home

Requested by: Dr. Renee P. Hill
Director
Division of Social Services

Question: As part of an involuntary commitment
proceeding does a district court judge have
the authority to require a county
department of social services to make
placement of a mental patient in a rest
home?

Conclusion: A district court judge does not have the
authority, as part of an involuntary
commitment proceeding, to require a
county department of social services to
make placement of a mental patient in a
rest home.

The following portion of G.S. 122-58.6(a) specifies the prerogatives
of a district court judge conducting an involuntary commitment
proceeding under the provisions of Article 5A, Chapter 122, General
Statutes of North Carolina, as follows:

"(a) Within five days, or for good cause shown for
delay, within 10 days of the date that the person is
taken into custody, a district court judge shall hear
the case to determine, by the reason of the commission
of overt acts, whether the person is violent and of
imminent danger to himself or others, or is gravely
disabled. If the district court judge makes such
determination, he shall order the person to be
committed to a treatment facility, or, in the
alternative, he may order outpatient treatment of the
person at a treatment facility or at a private facility
which provides mental health care and treatment;

provided, that treatment provided by a private facility shall be paid for by the person."

As is readily discernible, the authority of the district court judge to commit a patient for inpatient treatment extends only to commitment to a "treatment facility." G.S. 122-58.2(h) defines that term in the following language:

"(h) The words 'treatment facility,' as used in this Article, shall mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina, and, provided that approval of admission or commitment is obtained from the Director of the Inpatient Service, the Psychiatric Training and Research Center at the South Wing of the North Carolina Memorial Hospital at Chapel Hill for admission or commitment to that facility."

Clearly, a rest home is not a treatment facility within the purview of Article 5A, Chapter 122. Thus, as part of an involuntary commitment proceeding, a district court judge is not authorized to either direct commitment of a mental patient in a rest home or to require a county department of social services to place the individual in the rest home.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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11 April 1974

Subject: Public Officers and Employees; Conflict of Interest; Nepotism

Requested by: Mr. Roone Arledge, Chairman
City of Hendersonville Board of
Alcoholic Control

Question: Is it illegal or improper under Chapter 18A or any related statute of the Alcoholic Beverage Control Laws for the City of Hendersonville Board of Alcoholic Control to employ a son of the Mayor of the City of Hendersonville as a part-time bookkeeper in the office of the Board?

Conclusion: It would not be illegal or improper for the Board to employ a son of the Mayor of the City of Hendersonville as a part-time bookkeeper in the office of the Board.

An examination of the General Statutes of North Carolina, of Chapter 18A specifically, and of the Rules and Regulations of the North Carolina State Board of Alcoholic Control reveals nothing which would indicate that it would be a violation of any law or ABC regulation, either directly or "in spirit", for the son of the Mayor of the City of Hendersonville to be employed by the City Board.

The Rules and Regulations of the State of North Carolina Board of Alcoholic Control, Reg. III., A., 1., state:

"1. Disqualifications for appointment as a member of the State ABC Board or local ABC board, or for employment by either of said boards, on account of financial interest in the production, distribution, or sale of alcoholic beverages, or on account of relationship to persons so interested, are specified by the State law. (G.S. 18A-16)"

G.S. 18A-16(b) states:

"No person shall be appointed a member of either the State Board or any county board or employed thereby who is a stockholder in any brewery or the owner

of any interest therein in any manner whatsoever, or interested therein directly or indirectly, or likewise interested in any distillery or other enterprise that produces, mixes, bottles, or sells alcoholic beverages, or related by blood to a degree of first cousin or closer to any person likewise interested or associated in business with any person likewise interested. Neither the State Board nor any county board shall employ any person who is interested in, directly or indirectly, or related by blood to a degree of first cousin or closer to any person interested in any firm, person, or corporation permitted to sell alcoholic beverages in this State. Notwithstanding the provisions of this section, the State may, upon its own motion and its discretion, make determinative rulings as to the exception to the rules and determine possible conflict of interest."

It does not appear that 18A-16, reasonably construed, would prohibit the type of situation to which your inquiry is directed.

Robert Morgan, Attorney General
James Wallace, Jr.
Associate Attorney

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19 April 1974

Subject: Marriage and Divorce; Alimony *Pendente Lite*; Enforcement

Requested by: Honorable Frankie C. Williams
Superior Court Clerk
Rockingham County

Question: How may a judgment awarding alimony or alimony *pendente lite* be enforced?

Conclusion: A judgment awarding alimony or alimony *pendente lite* which does not contain an

express provision that the periodic alimony installments shall constitute a specific lien, in a sum certain, against the real property of the defendant or which does not contain an award of "alimony in gross" cannot be executed on in the absence of a further judicial proceeding to reduce the alimony arrearage to a specific money judgment.

G. S. 50-16.7(i) provides: "A judgment for alimony or alimony *pendente lite* obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments."

Obviously, a judgment for alimony or alimony *pendente lite* is a lien against real property, upon which execution may issue, where the judgment by its very terms expressly so provides, sets out the specific amount of the lien, and "adequately describes the real property affected". This is a principle which finds support in myriad cases and legal treatises. *White v. White*, 179 N. C. 592, 103 S.E. 216 (1920), *Vaughan v. Vaughan*, 211 N. C. 354, 190 S. E. 492 (1937), 2 Lee, North Carolina Family Law, Section 158, pp.248-249.

In addition, however, execution may issue in the following two instances:

- (1) When a judgment awarding alimony or alimony *pendente lite* is for a sum certain, i. e., "alimony in gross" or lump sum alimony, execution may issue pursuant to the provisions of G. S. 50-16.7(k) (enforcement by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales, and Article 31, Supplemental Proceedings). *Mitchell v. Mitchell*, 270 N. C. 253, 154 S. E. 2d 71 (1967), *White, supra*.

In *White* the judge awarded the wife \$500 in alimony pending further action in the cause. In *Mitchell* the court's judgment incorporated the spouses' separation agreement which imposed the obligation on the husband of paying his wife \$150 per month for ten years, or a sum certain total of \$18,000. The Supreme Court took pains to emphasize both that the obligation after its incorporation into the judgment became a judicially imposed obligation and that the alimony award was "in gross or 'lump sum alimony,' which is fundamentally the award of a definite sum of money for the wife's support and maintenance."

Mitchell at 257 citing 27A CJS, Divorce, Section 235 (1959). The Court went on to add that, "North Carolina has no statute authorizing the court to award alimony in gross but such alimony may be awarded with the consent of the parties." *Mitchell, supra*, at 257. And when such an award of alimony or alimony *pendente lite* is made in a judgment, execution may issue on that judgment without further judicial action.

- (2) When the judgment provides that the alimony or alimony *pendente lite* is to be paid by periodic installments with no particular time frame mentioned by which a sum certain could be computed (*Mitchell, supra*), before execution may issue the past due periodic payments must either by motion in the cause or by separate action, i.e., a suit on the debt, be reduced to money judgment "which shall be a lien as other judgments." The rudimentary reason for this is that until this reduction the court's judgment, strictly construed, is simply in the nature of a mandatory injunction ordering the performance of an act by the defendant for the benefit of the plaintiff. Until such time the judgment is

not a final adjudication of a debt owed the plaintiff by her (his) spouse. It is rather a periodic debt of the defendant susceptible of being reduced to a specific money judgment against him (her). Once the past due periodic payments are reduced to judgment by motion in the cause or by separate action, execution may, of course issue forthwith. *Barber v. Barber*, 217 N. C. 422, 427, 8 S. E. 2d 204 (1940); *Barber v. Barber*, 216 N. C. 232, 234, 4 S. E. 2d 447 (1939); *Lockman v. Lockman*, 220 N. C. 95, 103, 16 S. E. 2d 670 (1941).

In the second alternative mentioned above, a party may be precluded from effecting the reduction by motion in the cause for the reason that the judgment awarding the alimony or alimony *pendente lite* has been appealed to the North Carolina Court of Appeals thereby leaving no jurisdiction in the district court by which such a motion in the cause may be entertained. In this instance, the appropriate remedy, in the absence of a stay of execution, would be by way of commencement of a separate action on the current alimony debt owed the plaintiff by the defendant under the judgment awarding alimony or alimony *pendente lite* installments. Once judgment is obtained in this separate action it should be placed on the judgment docket, and execution may be issued upon request pursuant to G. S. 1A-1, Rule 62(a).

Robert Morgan, Attorney General
William Woodward Webb
Associate Attorney

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24 April 1974

Subject: Taxation; Ad Valorem; Leasehold Interest
in Exempt State-Owned Property

Requested by: Mr. D. R. Holbrook
Director, Ad Valorem Tax Division
N. C. Department of Revenue

Question: Does the exemption which applies to real property of the State Ports Authority extend to the leasehold of a lessee of that property?

Conclusion: No.

In 1961, the State Ports Authority leased a tract of its land in Wilmington to a lessee in furtherance of the public purposes for which the Authority was created. The land itself was exempt from ad valorem taxation. 40 N.C.A.G. 803. The lessee, a corporation, operates a terminal upon such property at which chemicals are received and transshipped. The question is whether the lessee is subject to ad valorem taxation, based upon the value of its leasehold.

The general rule is that "a leasehold interest for a term of years is a chattel real, and for the purposes of taxation, in the absence of a provision in the lease to the contrary, the whole of the land is assessable against the owner of the fee." *Cordell v. Grove Stone and Sand Company*, 247 N.C. 688, at 693.

Here, there is no lease provision to the contrary, but it is worthy of note that the *Cordell* case dealt with private parties, and the incidence of the tax would have fallen upon at least one of them in any event. In the matter under consideration here, since the fee is in the State and is exempt, the leasehold will escape taxation altogether, if it cannot be taxed to the lessee which is not exempt.

Such ought not be the case, and research reveals that such is not the case. In 23 ALR 248, the subject of taxation of leaseholds, where the lessor is a state or some other exempt entity, is thoroughly annotated and innumerable cases are cited and discussed in support of the conclusion that "the exemption from taxation enjoyed by governmental bodies with respect to lands owned by them does not extend to the leasehold of a tenant of those lands." Additional cases are cited in volumes 1-3, *ALR Blue Book of Supplemental Decisions*. We believe that the principle is too well established to be doubted, and perceive no reason why it would not be followed in North Carolina. Therefore, we are of the opinion that, here, the leasehold is taxable to the lessee.

It should be noted, however, that the measure of the value of a leasehold is different from that of the fee. The fair market value of a leasehold is "the difference between rental value of the remainder of the term and the rent reserved in the lease." Schmutz, *Condemnation Appraisal Handbook*, p. 227. If there is no difference, then of course there is no value to be taxed.

The opinion in 40 N.C.A.G. 803, referred to above, upon careful examination, reveals that the question there dealt with whether the tenant could be assessed with the total tax upon the appraised value of the leased property. To the extent that the opinion goes further and suggests or implies that the tenant may not be taxed upon the leasehold, in reliance upon the language of *Cordell v. Sand Company, supra*, that opinion is modified to conform with the opinion expressed herein.

Robert Morgan, Attorney General
Myron C. Banks
Assistant Attorney General

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29 April 1974

Subject: Social Services; Members of County Boards; Expiration of Terms of Office

Requested by: Dr. Renee P. Hill
Director
Division of Social Services

Question: In a county having a five-member county board of social services, is there a statutory prohibition against simultaneous expiration of the terms of office of both of the members who have been appointed by the board of commissioners?

Conclusion: The language of G.S. 108-11 providing for appointment of members of a five-member county board of social services

automatically prohibits the simultaneous expiration of the terms of office of both members who have been appointed by the board of commissioners, except in a county where a legislative enactment has specifically exempted the county from the provisions of that section. Where there has been no such exemption, this simultaneous expiration is *de facto* prohibited; where the county is exempted from the provisions of G.S. 108-11, the expiration of members terms will be controlled by the directive setting up the board.

G.S. 108-8 gives each county the option of having a three-member or a five-member county board of social services. G.S. 108-9 requires that, in the case of a five-member board, the county board of commissioners shall appoint two members, the North Carolina Social Services Commission shall appoint two members, and the board members so appointed shall select the fifth member. G.S. 108-10 provides that each member of the county board of social services shall serve for a term of three years with no member being permitted to serve more than two consecutive terms.

Against this background, the provisions of G.S. 108-11(b) prescribe the ground rules for expanding from a three to a five-member board of social services and stipulate the term of the initial appointment as follows:

"(b) Five-Member Board: Whenever a board of commissioners of any county decides to expand a three-member board to a five-member board of social services, the Social Services Commission shall appoint an additional member for a term expiring at the same time as the term of the existing member appointed by the board of commissioners, and the board of commissioners shall appoint an additional member for a term expiring at the same time as the term of the existing member appointed by the Social Services Commission. The change to a five-member board shall become effective at the time when the additional

members shall have been appointed by both the county board of commissioners and the Social Services Commission. Thereafter all appointments shall be for three-year terms."

The provisions of G.S. 108-11(a) and (b) are such that the normal result would be a staggering of the termination of the terms of office of the two members appointed by the county commissioners. However, significantly absent is any language absolutely prohibiting simultaneous ending of the terms of the two county commissioners appointees in counties exempted from the provisions of G.S. 108-11.

Further, recognition of the legislative history of this section dispels any idea that such a lack of specific provision was the result of mistake or inadvertence. For example, the predecessor of this statute (section 2, Chapter 247, Session Laws of 1963) made similar provision for enlargement of the county board of social services but contained the following strong language indicative of legislative intent to stagger the terms of the board members:

"It is the intent of this provision relating to five-member boards to provide for the appointment of one (1) member by the board of county commissioners and one (1) member by the State Board of Public Welfare in each year except for every third year, when the fifth member is appointed."

Notwithstanding the uncompromising language declarative of legislative intent, section 2 1/2 of Chapter 247 provided that these provisions shall not apply to eight named counties in the State.

In short, any legislative enactments excluding counties from the provisions of G.S. 108-11 could conceivably result in the situation described in the question as posed. In such a situation, due to the lack of statutory prohibition against simultaneous expiration of terms of office (in excluded counties), and absent curative legislative action readjusting the expiration of the terms of office involved, the simultaneous expiration of the terms of office of both members appointed by a board of commissioners would not be improper or unauthorized.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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14 May 1974

Subject: Infants and Incompetents; Public Health;
Distribution of Non-Prescriptive Methods
of Birth Control to Minors

Requested by: Mr. William R. Schmidt, M.P.H.
Program Coordinator
Health Departments of Brunswick,
Columbus, New Hanover and Pender
Counties

Question: Does Article 1A of Chapter 90 (G.S. 90-21.1 through G.S. 90-21.5) restrict or authorize the distribution of non-prescriptive methods of birth control to minors without parental consent but as part of a family planning program conducted by local health department?

Conclusion: Article 1A of Chapter 90 (G.S. 90-21.1 through G.S. 90-21.5) neither restricts nor authorizes the distribution of non-prescriptive methods of birth control to minors without parental consent but as part of a family planning program conducted by local health department.

Article 1A, in essence, describes the conditions under which it shall be lawful for a medical doctor "to render treatment to any minor without first obtaining the consent and approval" of a parent, guardian, or person standing *in loco parentis* to the child, G.S. 90-21.2 defines "treatment" as meaning:

"...any medical procedure or treatment, including

X-rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician licensed to practice medicine in the State of North Carolina that is used, employed, or ordered to be used or employed commensurate with the exercise of reasonable care and equal to the standards of medical practice normally employed in the community where said physician administers treatment to said minor."

G.S. 90-21.3 further delineates the surgical procedures contemplated while G.S. 90-21.5 singles out the treatment of venereal disease for special consideration. G.S. 90-21.4 immunizes any physician from liability for damages due to treatment administered within the context of Article 1A.

From the contents of the sections included in Article 1A, it is evident that none of the provisions therein address the subject of distribution of non-prescriptive contraceptive methods or materials to minors without consent from the responsible adult. This absence of any such language, however, should not be interpreted as indicating that these types of activities on the part of medical doctors or other personnel are authorized.

From the very nature of the type of information, services and supplies involved, it would appear that, absent consent, a very sound and valid basis for a damage suit by the parent, guardian, or individual standing *in loco parentis* would be created. In fact, it is entirely possible that in certain cases personnel concerned could well be subject to criminal prosecution. See G.S. 14-316.1(b).

It would seem that, in order to adequately protect individuals involved in these activities, statutory authorization therefor would be required. Without such authorization, individuals distributing non-prescriptive birth control methods without consent of the responsible adult are vulnerable to possible civil and criminal action.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

14 May 1974

Subject: Mental Health; Infants and Incompetents;
Authority to Apply for Voluntary
Admission To and Discharge From
Treatment Facilities

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services

Questions: (1) Under the provisions of Article 4,
Chapter 122, may a mentally ill adult who
has not been judicially determined to be
non compos mentis be voluntarily admitted
to a North Carolina treatment facility
solely upon his parents' request?

(2) Under the provisions of Article 4,
Chapter 122, may a minor who has been
voluntarily admitted to a treatment facility
for the mentally ill be discharged solely
upon his own request prior to the time he
reaches majority?

Conclusions: (1) Under the provisions of Article 4,
Chapter 122, a mentally ill adult who has
not been judicially determined to be *non*
compos mentis may not be voluntarily
admitted to a North Carolina treatment
facility solely upon his parents' request.

(2) Under the provisions of Article 4,
Chapter 122, a minor who has been
voluntarily admitted to a treatment facility
for the mentally ill may not be discharged
solely upon his own request prior to the
time he reaches majority.

Certain aspects of these two questions have been discussed in prior
opinions of the Attorney General. See 43 N.C.A.G. 161 and 43

N.C.A.G. 219. However, in view of the rewriting of Article 4, Chapter 122 of the General Statutes by the General Assembly, 1973 Session (2d Session 1974), these two questions must be re-examined.

Initially, the current Article 4, effective April 2, 1974, authorizes voluntary admission of any person suffering from "inebriety" or "mental illness" to a treatment facility which, for purpose of that Article, is defined as "...any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or inebriety, and any community mental health clinic or center operated in conjunction with the State." See G.S. 122-56.2.

After providing, in effect, that any individual who has been voluntarily admitted must be released within seventy-two hours after request for such release (G.S. 122-56.3), the following requirements are specified:

"§ 122-56.5. *Representation of minors and persons adjudicated non compos mentis.*—In applying for admission to a treatment facility, in consenting to medical treatment when consent is required, in giving or receiving any legal notice, and in any other legal procedure under this Article, a parent, person standing *in loco parentis*, or guardian shall act for a minor, and a guardian or trustee shall act for a person adjudicated *non compos mentis*."

From this latest legislative edict, it is apparent that the parents' authority to execute the application for admission to a treatment facility is limited to situations involving minor children. As to an adult, the individual concerned must execute the application unless he has been adjudicated *non compos mentis*; in the latter event, appropriate action must be taken by his guardian or trustee.

With regard to discharge of a minor from the type of treatment facility described in Article 4, the language of G.S. 122-56.5 clearly contemplates that the request for release must be made by a parent, a person standing *in loco parentis*, or a guardian.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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14 May 1974

Subject: Criminal Law and Procedure; Bail;
Terminating Liability

Requested by: Honorable P. B. Beachum, Jr.
District Court Judge

Questions: (1) Is the liability of a bail bondsman
terminated where judgment is deferred to
a time certain?

(2) Is the liability of a bail bondsman
terminated where judgment is stayed to a
time certain?

Conclusion: The liability of a bail bondsman is not
terminated in either of the above instances,
if the appearance bond is in accordance
with Appearance Bond Form AOC-L Form
51A.

The discharge of the bail would be determined by the conditions
of the bond. Appearance bond forms are standardized and supplied
by the Administrative Office of the Courts (AOC-L Form 51 and
Form 51A) and read in part as follows:

"This is a continuing bond from Court to Court, day
to day and session to session in the trial divisions of
the General Court of Justice, and THE CONDITION
OF THIS OBLIGATION IS SUCH, that if the
defendant shall appear before the _____ Court at
_____, North Carolina on the _____ day of
_____, 19____, at _____ o'clock _____.m. to answer
a charge of _____ and return for

trial from day to day and session to session, *until final judgment is entered in the trial divisions of the General Court of Justice*, and not depart the court without leave, then this obligation to be void; otherwise to remain in full force and effect." (Emphasis added)

Where judgment is deferred or stayed to a time certain, such is not a final judgment which would act to discharge the bail. See *State v. Mallory*, 266 N.C. 31, 145 S.E. 2d 335, 18 ALR 3d 1340, cert. den. 384 US 928, 16 L ed. 2d 531, 86 S. Ct. 1443; 1 NC Index 2d Arrest and Bail, pages 281-286.

Robert Morgan, Attorney General
William W. Melvin
Assistant Attorney General

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14 May 1974

Subject: State Departments, Institutions and Agencies; Department of Administration; Contracts; State Capitol Restoration; Certificate of Compliance

Requested by: Mr. William L. Bondurant
Secretary, Department of Administration

Questions: 1. Is G.S. 133-1.1, which requires the use of an architect or engineer for the preparation of plans and specifications for the repair or construction of public buildings and a "certificate of compliance" from the architect before the final payment can be received by the contractor and the architect, applicable to the capitol restoration project?

2. May the Department of Administration, in the case where the architect refuses to sign a certificate of compliance as required

by G.S. 133-1.1, make the final payment to the contractor and the architect?

Conclusions:

1. Yes. The provisions of G.S. 133-1.1 are applicable to all public buildings, which include the State capitol building, where the contract for construction or repair is in excess of \$20,000.00. 40 N.C.A.G. 541.

2. Although the receipt of the final payment by the architect and the contractor is prohibited by G.S. 133-1.1 until the required certificate of compliance has been received, the Department of Administration is justified in making the payment without the certificate of compliance under the circumstances of this particular case where the architect wrongfully withheld the required certificate.

The 1971 General Assembly appropriated the sum of \$525,000.00 to the Department of Administration for the State Capitol Restoration. Chapter 64 of the 1971 Session Laws authorized the Department of Administration to waive the competitive bidding requirements of Article 8 of Chapter 143 of the General Statutes and to enter into a negotiated "cost plus" contract for the restoration of the State capitol building. The plans and specifications for the restoration of the capitol building were prepared pursuant to an agreement on March 1971 with an architect. Pursuant to the authority from the General Assembly, the Department of Administration negotiated a "cost plus" fixed fee contract with a guaranteed maximum with Muirhead Construction Company for Phase I. Phase I of the restoration of the capitol building consisted of the repair of the exterior and the roof.

When the restoration work on Phase I as called for in the contract was completed, the architect employed for the project refused to issue a certificate of compliance in conformance with G.S. 133-1.1. The architect indicated the reason for the failure to issue the certificate of compliance was that "he could not get a satisfactory

explanation for the roofing subcontractor's unusually high 74.4% markup." All of the work was performed in accordance with the plans and specifications. The Department of Administration made the final payment to the contractor without the certificate of compliance from the architect.

The contract between the State and William Muirhead Construction Company, Inc., provided for the payment to the contractor for the work performed on a cost plus a fixed fee basis with a guaranteed maximum including the fixed fee in the total amount of \$298,900.00. Article 12 of the contract with the contractor required the contractor to request bids on work not performed by the contractor from subcontractors. The subcontracts were subject to the approval of the Department of Administration. The contract with "Muirhead" also contained this special provision: "The relationship between the roofing and painting subcontractors and the general contractor shall be the same as the relationship between the general contractor and the owner. There is a guaranteed maximum for the roofing and sheet metal work (\$123,800.00) and painting (\$9,995.00). These subcontractors will be reimbursed by the general contractor on a time and material basis with a reasonable allowance allowed for overhead and profit. All possible savings achieved through this method will be passed along to the owner."

The bid approved for the subcontract for the roofing was a cost plus contract in accordance with the special provisions. The roofing subcontract provided for the payment to the subcontractor of the direct cost of materials and labor, plus 76.4% of the direct cost of labor for overhead. The proposal submitted by Hamlin Roofing Company on April 24, 1972, was approved by the Department of Administration and accepted by the contractor pursuant to the conditions of the general contract. The work was performed by the roofing subcontractor in accordance with his bid to the general contractor. It does not appear that there was any authority for the architect to question the provisions of the subcontract that has been approved by the owner and architect after the subcontract had been approved and work had been performed in accordance with the plans and specifications.

G.S. 133-1.1 provides that plans and specifications for *State-owned buildings* shall be prepared by a registered architect or by a registered

engineer. Subsections (b) and (f) provide as follows:

"(b) On all projects requiring the services of an architect or engineer, or both, the architect or engineer or both whose names and seals appear on plans and specifications, shall inspect the construction, or repairs or installations, and based upon said inspection shall issue a signed and sealed *certificate of compliance* to the awarding authority that the contractor *has fulfilled all obligations of such plans, specifications, and contract*. No certificate of compliance shall be issued until the architect and/or engineer is satisfied that the contractor has fulfilled all obligations of such plans, specifications, and contract." (Emphasis added)

"(f) Neither the designer nor the contractor involved shall receive his final payment until the required *certificate of compliance* shall have been received by the awarding authority." (Emphasis added)

G.S. 133-4 provides that "Any person, firm, or corporation violating the provisions of this Chapter shall be guilty of a misdemeanor and upon conviction, license to practice his profession in this State shall be withdrawn for a period of one year and he shall be subject to a fine of not more than five hundred dollars (\$500.00)."

Article 1 of Chapter 133 was enacted by the 1933 General Assembly, Chapter 66 of the 1933 Session Laws. Section 1 of the 1933 Act prohibits a conflict of interest by architects and engineers retained for the design and construction of public buildings. Section 2 makes it unlawful for any architect or engineer employed by the State or local government to employ or allow any manufacturer or his representative to draw specifications for work. Section 3 requires the architects, engineers, etc., to specify at least three items that may be used in competition when at all possible. Section 4 provides that any person, firm or corporation violating the provisions of this Chapter shall be guilty of a misdemeanor and, upon conviction, license to practice his profession this day shall be withdrawn for a period of one year and he shall be subject to a fine of not more than \$500.00.

Chapter 1339 of the 1953 Session Laws amended Chapter 133 to insert G.S. 133-1.1, which provided that certain State officers *may* require buildings under their jurisdiction to be designated by a registered architect or engineer and *may* require a certificate of compliance from the architect or engineer. Chapter 994 of the 1957 Session Laws rewrote G.S. 133-1.1. The pertinent provisions of this section as amended have already been set out. The legal effect of an amendment is the re-enactment of the old statute with the amendment incorporated in it and the amendment from its adoption has the same effect as if it had been a part of the statute when first enacted. 7 *Strong, N. C. Index 2d Statutes* ¶7. The existing penalty provisions applied to a violation of a conflict of interest provisions. The penalty provision was not changed by the 1953 or the 1957 amendments. The penalty provision as applied to G. S. 133-1.1 is ambiguous, but it appears to apply to the violation of the architect or engineer and the contractor *receiving the final payment* without the required certificate of compliance, and not to the awarding authority *making the final payment*. The general rule of statutory construction requires that a criminal or penal statute be strictly construed which means that it may not be extended by implication or equitable construction beyond the scope of the language employed. 7 *Strong, N. C. Index 2d Statutes* ¶10. The language employed prohibits the architect and contractor from receiving the final payment without receipt of the certificate of compliance by the awarding authority. This Office is of the opinion that, based upon the facts indicated, there was no violation of the law by the public officials involved in making the final payment without the certificate of compliance.

Research of this Office has not discovered any laws in any other state similar to G. S. 133-1.1 which purport to make it a misdemeanor to receive the final payment in a design or construction contract without a certificate of compliance or certificate of performance. All of the cases found appear to involve the enforcement of a contract provision containing the requirement for a certificate of compliance or certificate of performance.

A contract provision requiring the architect's or engineer's approval and certificate of compliance is for the benefit of the owner and he may waive compliance therewith by the contractor. Under general contract principles, there are a number of circumstances which

permit the waiving of the required certificate. The *American Law Institute*, Restatement, Contracts, states the rule as follows: "Where a certificate of an architect, surveyor or engineer is a condition precedent to a duty of immediate payment for work, the condition is excused if the architect, surveyor or engineer...(c) refuses to give a certificate after making an examination of the work and finding it adequate." See to the same effect 17A C.J.S. *Contracts* ¶499(7) and *Simpson, Contracts*, 2nd Ed. (1965), paragraph 150, page 312. Where the architect or engineer exceeds the authority conferred on him and assumes to pass on matters not contemplated by the contract, his decision on such matters is not conclusive. 13 Am. Jur. 2d *Building and Construction Contracts* ¶36; 64 Am. Jur. 2d, *Public Works and Contracts* ¶118; 54 ALR 1265 Anno. at page 1264.

The work was performed in accordance with the plans and specifications. The architect's reason for the refusal to sign the certificate of compliance was that he could not get a satisfactory explanation for the roofing subcontractor's unusually high 76.4% markup. The subcontract containing the provision for the 76.4% markup had been approved in accordance with Article 12 of the general contract with Muirhead prior to performing any work. The architect exceeded his authority in attempting to revise the provision of the subcontract with the roofing subcontractor after the work had been performed in accordance with the contract provisions. The failure of the architect to execute the required certificate of compliance for the reason given is neither in conformance with G. S. 133-1.1 nor the contract between the general contractor and the State. It is the opinion of this Office that, under the general contract principles cited, the refusal of the architect to furnish the required certificate on the grounds for which he was not authorized permitted the Department of Administration to waive the requirement of the certificate and to make the final payment.

Robert Morgan, Attorney General
Eugene A. Smith
Assistant Attorney General

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14 May 1974

Subject: Motor Vehicles; Driving Under the Influence; Plea Bargaining, Careless and Reckless Driving

Requested by: Honorable Robert Vance Somers
Senator - 21st District

Question: Are there any other lesser included offenses to the crime of driving while under the influence of alcohol? Specifically, is reckless driving a lesser included offense?

Conclusion: Reckless driving is not a lesser included offense of driving under the influence under the present statutes. However, after January 1, 1975, pursuant to G.S. 20-140(c), reckless driving will be a lesser included offense, and under the provisions of G.S. 20-138(b), driving with a blood alcohol level of 0.10 will become a separate offense. (See NOTE at end of opinion).

The offense of careless and reckless driving (G.S. 20-140) is not a lesser included offense embraced by the misdemeanor of driving under the influence (G.S. 20-138). The two are "separate and distinct violations of law", although they may be so related to the same transaction as to permit being charged as separate counts in the same bill of indictment. *State v. Fields*, 221 N.C. (1942); *State v. Craig*, 21 N.C. App. 51 (1974).

Due to the holding in *State v. Fields, supra*, it would appear that the better procedure to follow would be to add a new charge of careless and reckless driving and dispose of this charge prior to nolo prosequendo the charge of driving while under the influence of intoxicants. Since the defendant can appeal from the careless and reckless conviction in the district court to the superior court for a trial *de novo*, all of the elements necessary to convict for careless and reckless driving should be present before a negotiated plea is accepted. Driving while drinking alone will not sustain a charge of careless and reckless driving.

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation, the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *State v. McClure*, 267 N.C. 212 (at 215) (1966).

G. S. 20-140(a) and (b) provide:

"(a) Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

Taking into consideration the holding in *State v. McClure, supra*, and the provisions of G.S. 20-140(a) and (b), the adding of what purports to be a second count to the warrant by the solicitor by simply writing on the warrant "careless and reckless driving" will not meet the requirements. A new warrant should be issued in proper form and fully executed, charging careless and reckless driving.

To be procedurally correct, it would appear that the charge of careless and reckless driving must be in sufficient detail to charge the offense. See *State v. Floyd* 15 N.C. App. 438 (1972).

It would appear that if a particular court persisted in improper procedure, such acts would fall within the jurisdiction of the Judicial Standards Commission established pursuant to G.S. 7A-375.

NOTE: G.S. 20-140(c) and G.S. 20-138(b), effective January 1, 1975 (Chapters 1330 and 1081, 1973 Session Laws, 2d Session 1974), provided:

"(c) Any person who operates a motor vehicle upon a highway or public vehicular area after

consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-128 as amended."

"(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight and upon conviction if such conviction is a first conviction under this section, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b); provided, that second and subsequent convictions under this section shall be punishable as provided in G.S. 20-179(a)(2) and (3). An offense under this subsection shall be treated as a lesser-included offense of the offense of driving under the influence."

Robert Morgan, Attorney General
William W. Melvin
Assistant Attorney General

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17 May 1974

Subject: Mental Health; Involuntary Detention and Commitment of Inebriates and Mentally Ill Persons; Ability to Require Non-Consenting Private Hospitals to Accept Inebriates or Mentally Ill Patients

Requested by: Dr. N. P. Zarzar
Director
Division of Mental Health Services

Questions: (1) Under the provisions of Article 5A, Chapter 122, effective June 12, 1974, is a private hospital required to accept over

its objection an alleged mentally ill person or inebriate for detention prior to the commitment hearing in the district court?

(2) Under the provisions of Article 5A, Chapter 122, effective June 12, 1974, is a private hospital required to accept over its objection a mentally ill person or an inebriate who has been involuntarily committed by the appropriate court?

Conclusions:

(1) Under the provisions of Article 5A, Chapter 122, effective June 12, 1974, a private hospital may not be required to accept over its objection an alleged mentally ill person or inebriate for detention prior to the commitment hearing in the district court.

(2) Under the provisions of Article 5A, Chapter 122, effective June 12, 1974, a private hospital is not required to accept over its objection a mentally ill person or an inebriate who has been involuntarily committed by the appropriate court.

In prior opinions, this Office has had occasion to directly and tangentially address the subjects involved here. See 43 N.C.A.G. 342 (1974), 43 N.C.A.G. 95 (1973), and 42 N.C.A.G. 66 (1972). These opinions adequately resolve the present questions insofar as the current and prior involuntary commitment statutes are concerned. However, inasmuch as the General Assembly has again this year totally rewritten Article 5A, it is necessary to re-examine these two questions in the light of the new statutes effective June 12, 1974.

As to pre-hearing restraint, the new statute authorized detention, where appropriate, in a community mental health facility, in the respondent's home, in a private hospital, in a general hospital or in a regional mental health facility. See G.S. 122-58.4 (a) and (c), and G.S. 122-58.6(a). Similarly, commitment, where appropriate, is permitted "...at a mental health facility, public or private, designated

or licensed by the Division of Mental Health Services. Treatment at a private facility shall be at the expense of the respondent to the extent that such charges are not disposed of by contract between the county and the private facility." See G.S. 122-58.8(b).

Additional provisions for inclusion of facilities operated by the Veterans Administration in cases involving detention or commitment of eligible veterans (G.S. 122-58.15), and designated community or regional health facilities in emergency cases involving violent persons (G.S. 122-58.18) round out the guidance furnished on these questions in Article 5A.

It is apparent that all references throughout Article 5A regarding use of a private hospital contemplated a situation where: (1) The respondent desires use of this type of facility and the costs of hospitalization are to be borne by him, or (2) where use of a private hospital is contracted for by the county as a means of fulfilling its responsibilities to its residents. These provisions clearly contemplate use of a consenting private hospital. Nowhere is any language to be found indicating an intent to force acceptance of this type of patient upon a protesting private hospital.

It would seem that the following rationale from the opinion of the Attorney General dated 7 September 1972 (42 N.C.A.G. 66) is still apropos:

"Deliberate consideration of the ramifications of the types of situations involved buttresses this conclusion. Obviously, the type of patient covered by this section presents unusual materiel and personnel problems for a hospital assuming custody. Adequate control over and treatment of these patients would require quantities and kinds of facilities, equipment, and skilled personnel not necessarily found in every hospital. Further, the very act of assuming the custody of inebriates and mentally ill persons raises a specter of claims of malpractice (spurious or otherwise) and legal actions against the responsible institution which would cause concern to the average hospital. In view of the fertile field for litigation, which this type of treatment provides in the present day and time, it

would be unconscionable, if not unconstitutional, to require a hospital to involuntarily assume these risks."

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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17 May 1974

Subject: Prisons and Prisoners; Safekeeping;
Applicability of Statute of Limitations for
Cost of Keeping Prisoners.

Requested by: Mr. James Peeler Smith
Senior Administrative Assistant
Department of Social Rehabilitation and
Control

Question: May a county assert the statute of
limitations against the State for costs
incurred by the State in safekeeping county
prisoners under G.S. 162-39?

Conclusion: A county may assert the statute of
limitations against the State for costs
incurred by the State in safekeeping county
prisoners under G.S. 162-39.

The obligations here under consideration arise as a result of G.S. 162-39 which provides that county prisoners, in order to avoid a breach of the peace, may be transferred to the State Prison system and "The county from which a prisoner is transferred shall pay ... to the State Department of Correction if he is received in a prison unit, the actual cost of maintaining the prisoner in that jail or prison unit for the time designated by the Court."

N.C.G.S. 1-30 provides that "The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties."

N.C.G.S. 1-52(1) prevents an action after three years "Upon a contract, obligation or liability arising out of a contract..." and N.C.G.S. 1-52(2) prevents an action after three years "Upon a liability created by statute, other than a penalty or forfeiture..."

While the provisions of G.S. 1-30 were originally adhered to by the North Carolina Supreme Court regardless of the nature of the actions involved (*Furman v. Timberlake*, 93 N.C. 66 (1885); *Tillery v Lumber Co.*, 172 N.C. 296 (1916)), that Court has more recently distinguished between those functions of a purely governmental nature wherein sovereign power is exercised and those functions which involve exercising proprietary functions.

In *Guilford County v Hampton*, 224 N.C. 817 (1945), the North Carolina Supreme Court held that a suit growing out of an attempt by a county to recover welfare payments was one growing out of a contract and proprietary in nature with the provisions of G.S. 1-30 applying. The case of *Charlotte v. Kavanaugh*, 221 N.C. 259 (1942), was a holding to the same effect regarding special assessments although the Court stated that G.S. 1-30 would apply if taxes had not been involved.

In *Reidsville v. Burton*, 269 N.C. 206, 210 (1967), the Court drew the distinction between sovereign and other types of powers which may be exercised by a governmental agency by stating:

"It is generally held in this State and in the other States that the statute of limitations is no defense in actions by a municipality involving public rights or the exercise of governmental functions. It is also generally held in this State and in other States, except as provided otherwise by constitutional or statutory provisions, that the statute of limitations may be interposed as a defense to an action by a municipal corporation to enforce private, corporate or proprietary rights." (citations omitted)

The Court further stated at page 211:

"The suit in the instant case is an action *ex contractu* to recover the cost of rebuilding the bridge upon a

breach by defendant of his contract with plaintiff to replace it. In our opinion, and we so hold, the present action is an action to enforce private, corporate or proprietary rights, and as such the three-year statute of limitations may be interposed as a defense by defendant."

In *Guilford County v Hampton, supra*, the County Commissioners of Guilford County brought an action to collect compensation for maintenance and support of Sara Saferight while she was an inmate in the Guilford County Home. The sums expended for Sara Saferight's maintenance and upkeep extended back some thirty-four years. The North Carolina Supreme Court held that the statute of limitations could be used against the State stating at page 820:

"Uniformly a distinction has been observed between actions brought by the State, counties and municipalities in their sovereign capacity, and those brought with respect to proprietary demands. The terminology is hardly sufficient for a complete classification unless there is included in the definition of proprietary claims certain causes of action contractual in their nature, or similar obligations arising out of the statute. The county of Guilford is under what we might regard as a constitutional mandate to provide for its poor at the public expense, through the levying and collection of a general tax for that purpose, and may provide a County Home. It is under no constitutional mandate to collect from a nonindigent inmate, or from her property, reimbursement for sums disbursed for her maintenance. That is merely a wise and just provision of the statute,..."

Then at page 821 the Court stated thusly:

"No one could contend that the power thus sought to be exercised by a civil action is the sovereign power of condemnation, conscription, or taxation, for, amongst other disqualifying features, it is not for a public purpose. It reaches no further than fair

compensation for the maintenance, care and attention given her. It tends to reduce the general taxes, of course, but in so far as the defendant is concerned, and her relation to the action and to the party plaintiff, it is a private obligation arising out of the statute, which provides a simple procedure for its collection out of private property. While the general law may affect a great many persons, it is not in any sense a contribution levied by the State or county in its sovereign capacity for a public purpose, and is subject to the bar of the three-year statute of limitations."

The actions under consideration here are very similar to those in the case of *Guilford County v Hampton, supra*. These actions are to collect monies expended in maintaining county prisoners at State expense. The State is attempting to collect on a contract for services rendered and such action is civil in nature. It does not involve the "sovereign power of condemnation, conscription, or taxation" and "it is not for a public purpose." As stated by the North Carolina Supreme Court, "It reaches no further than fair compensation for maintenance, care and attention given..." to county prisoners.

It therefore follows that the obligations created by G.S. 162-39 making a county liable for costs incurred by the State in maintaining and keeping county prisoners are not powers exercised by the sovereign in its sovereign capacity. The statute of limitations may therefore be plead by the county in bar of payment of such costs. While not specifically requested, this opinion would also apply to obligations created under G.S. 15-183 concerning the safekeeping of county prisoners by the State pending appellate review. (See opinion of the Attorney General to Mr. Martin R. Peterson, Director of Legal Services of North Carolina Department of Correction, 40 N.C.A.G. 163 (1969)). Cf. G.S. 148-29.

Robert Morgan, Attorney General
John R. B. Matthis
Assistant Attorney General

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17 May 1974

Subject: Mental Health; Involuntary Commitment;
Definition of "Qualified Physician"

Requested by: Dr. N. P. Zarzar
Director
Division of Mental Health Services

Question: After June 12, 1974, does a physician who is licensed elsewhere as a medical doctor, though not licensed in North Carolina, but who occupies the status and is performing the function of a physician with the Veterans Administration, U. S. Public Health Service, or a branch of the Armed Forces of the United States, come within the term "qualified physician" as used in Article 5A, Chapter 122?

Conclusion: After June 12, 1974, a physician who is licensed elsewhere as a medical doctor, though not licensed in North Carolina, but who occupies the status and is performing the function of a physician with the Veterans Administration, U. S. Public Health Service, or a branch of the Armed Forces of the United States, does come within the term "qualified physician" as used in Article 5A, Chapter 122.

A similar question relating to the present involuntary commitment statutes has recently been answered by this Office. See 43 N.C.A.G. 175 (1973). However, this has again become a germane question in view of the newly enacted Article 5A which revises the involuntary commitment statutes of this State effective June 12, 1974.

Although the new Article 5A requires examination and treatment of the respondent by a "qualified physician" at various stages of the proceedings, nowhere in the Article is this term defined. At

the present time, G.S. 122-36(f) defines this term as meaning a medical doctor who is duly licensed by this State to practice medicine. Inasmuch as the current Article 5A specifically adopted this definition (G.S. 122-58.2(g)), the current statutes together with the Attorney General's opinion previously referred to adequately establish the scope of the term involved.

However, by virtue of the same bill which enacted the new Article 5A, the General Assembly repealed G.S. 122-36(f), effective the same date as that applicable to the new Article. See Section 3, Chapter 1408, 1973 Session Laws (2d Session 1974). In view of the obviously knowing action taken by the General Assembly, it seems obvious that it was the legislators' intent that this term be interpreted in accord with common usage.

Turning to the American Heritage Dictionary of the English Language (1973), we find that the word "qualified" equates to "competent, suited, or having met the requirements for a specific position or task."

Taken in that light, it is worthy of note that the latest action of the General Assembly appears to buttress the prior conclusion arrived at in the opinion of the Attorney General found at 43 N.C.A.G. 175. The same rationale utilized in that opinion would also be applicable to the new statutes.

Realistically, it would seem that the unequivocal language of the latest Article 5A serves to include a physician not licensed in North Carolina, but properly licensed elsewhere, who is employed by, appointed by, or serving with the Veterans Administration, the U.S. Public Health Service, or a branch of the Armed Forces in this State, while he is in the performance of his duties with his particular agency or department.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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17 May 1974

Subject: State Departments, Institutions and Agencies; Real Property; Lease; Advertisement for Proposals for Space to be Leased by State

Requested by: Mr. M. E. White
State Property Officer
North Carolina Department of Administration

Questions: Chapter 1448 of the Session Laws of 1973 (2d Session, 1974), codified as G.S. 146-25.1, requires State agencies to advertise for proposals for space needed to be leased by the agency where the annual rental exceeds \$7,500.00 or where the term of the lease exceeds 3 years. The Act was ratified and became effective on the 13th day of April, 1974.

(1) Where a tentative agreement to lease certain space had been reached by a representative of an agency prior to April 13, 1974, but the agreement was pending consideration of and had not been approved by the Council of State, must this agreement be abandoned and the agency begin anew with advertisement as required by the Act?

(2) Where leased space is presently occupied by an agency, and the lease is expiring with no option to renew at an express rental, may the agency negotiate with the lessor to remain in the space under a new lease without complying with the advertising requirement of the Act?

(3) May an agency rent space without using

the procedure outlined in the Act in the case of an emergency, such as having employees with no place in which to work, or being faced with the loss of substantial funds, federal or other, if a lease is not entered immediately?

Conclusions:

(1) Yes, if no binding agreement to lease had been made prior to April 13, 1974, State agencies must follow the procedures of the Act.

(2) No, where leases expire after April 13, 1974, and a new lease must be negotiated, the procedure of the Act must be followed.

(3) There is no express provision in the Act which allows leasing in an emergency situation different from other leases.

The legislation adopted by the General Assembly in 1974 and codified as G.S. 146-25.1 was designed to allow an opportunity for various potential lessors to present proposals to State agencies for their consideration before space was leased. Nowhere in the Act is there provision for exemption of leases then being negotiated. The Council of State has final authority to accept or reject a proposed lease. Leases not approved by that body before April 13, 1974, would still be in a negotiation stage. In such case, the Act would apply, and the agency involved would have to comply with its procedures, and allow the submission of proposals.

Nowhere in the Act is there provision for exemption for leases of premises already occupied. Therefore, when a new lease agreement is to be negotiated, that is, where there is no option to renew the present lease under stipulated terms, there must be compliance with the procedures of the Act.

There is no express provision in the Act dealing with the leasing of real property for State agencies upon an emergency basis.

It should be pointed out that G.S. 146-32 allows the Governor,

with the approval of the Council of State, to adopt rules and regulations exempting from any or all of the requirements of Sub-chapter II of Chapter 146 of the General Statutes, of which this Act is a part, those classes of lease or rental transactions as he deems advisable, and authorizing any State agency to enter into and/or approve those classes of transactions exempted by such rules and regulations from the requirements of Chapter 146. See also G.S. 143-341(4)d.

This Act does not require acceptance of the proposal with the lowest rental. The agency shall negotiate with all potential lessors, taking into account rental, type of space, location, suitability, services offered by lessor, and all other relevant factors. See G.S. 146-25.1(b). If the lowest rental rate is not accepted, then there must be justification to the satisfaction of the Department of Administration and the Council of State.

Robert Morgan, Attorney General
Rafford E. Jones
Assistant Attorney General

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21 May 1974

Subject: Agriculture; Grain Dealers; Article 53,
Chapter 106 (G.S. 106-601, et seq.);
Hauling Grain Without Transfer of Title

Requested by: Honorable James A. Graham
Commissioner of Agriculture

Question: Is a person, firm or corporation who
physically transfers (hauls) grain of a
producer without a transfer of title of the
grain required to be licensed under the
Grain Dealers Law, Article 53, of Chapter
106 of the General Statutes?

Conclusion: No. There must be a transfer of title, or
storage obligation, of the person, firm or
corporation physically transferring

(hauling) the grain before a grain dealer's license is required.

Chapter 665, Session Laws of 1973, codified as Article 53 of Chapter 106 of the General Statutes (G.S. 106-601 et seq.), requires the licensing of grain dealers. A "grain dealer" is defined as "any person owning, controlling or operating an elevator, mill, warehouse or other similar structure or truck or tractor-trailer unit or both who buys, solicits for sale or resale, processes for sale or resale, contracts for storage or exchange, or transfers grain of a North Carolina producer. The term 'grain dealer' shall exclude producers or groups of producers buying grain for consumption on their farms."

In our opinion the word "transfer" is not used in G.S. 106-601(e) in its broadest sense, but is restricted by two other sections of the Act, 106-605 and 106-606.

G.S. 106-605 requires a ten thousand dollar bond for grain dealers. G.S. 106-605 sets out the provisions of the bond and provides in pertinent part, "Such bond shall be made payable to the State of North Carolina with the Commissioner as trustee and shall be conditioned upon the grain dealer's faithful performance of his duties as a grain dealer and his compliance with this Article and shall be for the use and benefit of any producer from whom the grain dealer may *purchase or store grain and who is not paid by such grain dealer*, ..." (Emphasis added)

G.S. 106-606 provides:

"The grain dealer license shall be posted in a conspicuous place in the place of business. In the case of a licensee operating a truck or tractor-trailer unit, the licensee is required to have a decal that the license is in effect and that a bond has been filed, such decal to be carried in each truck or tractor-trailer unit *used in connection with the purchase of grain* from producers." (Emphasis added)

In our opinion, when Article 53 is read in its entirety and particularly when the sections quoted above are construed in *pari*

materia, the law provides that only where there is a transfer of title of the hauled grain, or the grain is being hauled by the storer of grain or his agent for storage, is a grain dealer's license required by the hauler.

Robert Morgan, Attorney General
Millard R. Rich, Jr.
Assistant Attorney General

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21 May 1974

Subject: Health; Sanitation of Food and Lodging
Establishments; Interpretation of Article 5
of Chapter 72 of the General Statutes

Requested by: Mr. L. Patten Mason
County Attorney
Carteret County

Question: Are the distribution facilities for a food
program for elderly citizens subject to
inspection and grading under Article 5 of
Chapter 72 of the General Statutes?

Conclusion: The distribution facilities are subject to
inspection and grading.

Community Action, Inc., sponsors a food distribution program for elderly citizens in Carteret County. Community Action, Inc., is funded by the federal and local governments. The food is prepared by a caterer, which is inspected and graded in accordance with Article 5 of Chapter 72, and then distributed by the caterer at various facilities throughout the county. The distribution program consistently utilizes the same facilities for the purpose of serving food to the elderly citizens.

Prior to amendment by 1973 Session Law Chapter 476, s. 128(b)(2), G.S. 72-46 provided that the State Board of Health was authorized to prepare and enforce rules and regulations governing the sanitation of, *inter alia*, "all other establishments

where food or drink is prepared, handled, and/or served for pay." After the 1973 amendment, G.S. 72-46 provides that the State Commission for Health Services is authorized to prepare and the Department of Human Resources is authorized to enforce rules and regulations governing the sanitation of, *inter alia*, "all other establishments where food or drink is prepared, handled, and served for pay." Question arises as to the proper interpretation of the substitution of "and" for "and/or" in the portion of the section quoted above.

In *Vogel v. Reed Supply Co.*, 277 N. C. 119, 131, 166 SE 2d 663 (1970), the Supreme Court stated:

"Words and phrases of a statute must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." (p. 120)

In 3A C.J.S., *And*, it is stated:

"Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word 'and' is sometimes construed to mean 'or'. This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user."

Finally, in *State v. Klosowski*, Del. Super., 310 A 2d 656, 657 (1973), it is stated:

"'And' is a connective, in its commonly accepted meaning, and is not generally used to express an alternative - unless it is followed by words which clearly indicate that intent."

It is the opinion of this Office that "and" as used in the portion of G.S. 72-46 quoted above is used as a disjunctive rather than a conjunctive because such is the only interpretation which can

harmonize the portion of G.S. 72-46, amended by the 1973 act, with the provisions of G.S. 72-47 and 72-48 which, unaffected by the 1973 act, still retain "and/or" in phrases identical to that in G.S. 72-46.

G.S. 72-47, as presently written, authorizes officers, sanitarians, and agents of the Department of Human Resources to enter, *inter alia*, "all other establishments where food or drink is prepared, handled and/or served for pay" for the purpose of making inspections and requires them "to leave with the management...a copy of his inspection and a grade card showing the grade of such place." It is G.S. 72-46 which authorizes grading, establishes guidelines for promulgation of standards for grading and requires a minimum grade of "C" for operation of an establishment. It is clear that G.S. 72-46 and G.S. 72-47 are intended by the Legislature to apply to the same establishments. This intent can only be effectuated if "and" in the portion of G.S. 72-46 quoted above is viewed as a disjunctive. Note, further, that G.S. 72-48, the criminal enforcement provision of Article 5, also applies to, *inter alia*, "all other establishments where food or drink is prepared, handled and/or served."

Question also arises in regards to the food distribution program as to whether or not the food is being prepared, handled, and served "for pay." Although money is not changing hands between the elderly citizens and the caterer, it is clear that federal and local money is funding Community Action, Inc., which in turn contracts with the caterer for his services. The food is being prepared, handled, and served for pay.

The food distribution facilities are subject to inspection and grading under Article 5 of Chapter 72 in that the facilities have been utilized over a period of time as distribution centers for the purpose of providing meals to elderly citizens; food and drink are being handled and served, if not prepared, at these facilities; and the meals are being provided for pay.

Robert Morgan, Attorney General
Robert R. Reilly
Associate Attorney

22 May 1974

Subject: Counties; Regulation of Parking on County Property

Requested by: Mr. F. L. Carr
Wilson County Attorney

Question: Must the city approve, by resolution, county parking ordinances on county property located within the city?

Conclusion: No.

G.S. 153A-170 reads:

"§ 153A-170. *Regulation of parking on county property.* - A county may by ordinance regulate parking of motor vehicles on county-owned property. Such an ordinance may be enforced pursuant to G.S. 153A-123. In addition, the ordinance may provide that vehicles parked in violation thereof may be removed from the property by the county or an agent of the county to a storage area or garage. If a vehicle is so removed, the owner, as a condition of regaining possession of the vehicle, shall be required to pay to the county all reasonable costs incidental to the removal and storage of the vehicle and any fine or penalty due for the violation."

G.S. 153A-122 reads:

"§ 153A-122. *Territorial jurisdiction of county ordinances.* - Except as otherwise provided in this Article, the board of commissioners may make any ordinance adopted pursuant to this Article applicable to any part of the county not within a city. In addition, the governing board of a city may by resolution permit a county ordinance adopted pursuant to this Article to be applicable within the city. The city may by resolution withdraw its

permission to such an ordinance. If it does so, the city shall give written notice to the county of its withdrawal of permission; 30 days after the day the county receives this notice the county ordinance ceases to be applicable within the city."

G.S. 153A-123 relates to the method of enforcement of ordinances adopted by the county.

G.S. 153A-170 is specific in nature granting to the counties the right by ordinance to regulate parking of automobiles on county property, which could and should not be of concern to the cities within the county or within which the county-owned property lies.

G.S. 153A-122 is general in nature and provides for city approval by resolution before a general county ordinance such as, but not limited to, blue laws, obscenity laws, etc., can be applicable within the city.

We are of the opinion that the General Assembly did not intend to restrict or reduce the counties' control over their property. Therefore, county ordinances establishing parking regulations on county-owned property within the city would not require the concurrence of the city to become effective. The provisions of G.S. 153A-170, being specific, would create an exception to the general provisions of G.S. 153A-122.

Robert Morgan, Attorney General
William W. Melvin
Assistant Attorney General

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28 May 1974

Subject: Health; Ground Absorption Sewage
Disposal System; Interpretation of
Article 13C of Chapter 130 of the General
Statutes

Requested by: Mr. Ben Eaton
Special Assistant to the Director
Division of Health Services
Department of Human Resources

- Questions:
- (1) Who is responsible for obtaining an improvements permit and a certificate of completion for a mobile home?
 - (2) Are an improvements permit and a certificate of completion required before a mobile home is placed on a lot for storage or for sale?
 - (3) Are an improvements permit and a certificate of completion required before a mobile home is occupied for business purposes?

- Conclusions:
- (1) G.S. 130-166.25(a) requires any person who locates, relocates or causes to be located or relocated any mobile home to first obtain an improvements permit; G.S. 130-166.26 requires that a certificate of completion be obtained before any person occupies a mobile home.
 - (2) An improvements permit and a certificate of completion are not required before a mobile home is placed on a lot for storage or for sale.
 - (3) An improvements permit and a certificate of completion are not required before a mobile home is occupied for business purposes.

G.S. 130-166.25(a) provides in part that "nor shall any person locate, relocate or cause to be located or to be relocated any mobile home... without first obtaining an improvements permit."

G.S. 130-166.33 provides in part that "/a/ny person who knowingly violates any provision of this Article shall be guilty of a misdemeanor." The import of these two sections is to render anyone (dealer or purchaser) who knowingly locates, relocates or causes to be located or to be relocated a mobile home without first obtaining an improvements permit (other provisions of G.S. 130-166.25(a) being satisfied) guilty of a misdemeanor. Therefore, it would behoove any mobile home dealer who undertakes to locate, relocate or cause to be located or to be relocated a mobile home to assure himself that an improvements permit has been obtained. The realities of the market place would place the obligation of obtaining the improvements permit, unless assumed by the dealer as an inducement for purchase, on the purchaser. The intent of G.S. 130-166.31, which requires the posting of a summary of the provisions of the Article at every mobile home sales office and the distribution of said summary to each mobile home purchaser, is to insure that the purchaser is made aware of this responsibility.

G.S. 130-166.26 provides in part that "/n/o person shall occupy a dwelling or mobile home until a certificate of completion has been issued." The section places no obligation on a dealer of mobile homes to obtain a certificate of completion unless, of course, he intends to occupy the mobile home.

G.S. 130-166.25(a) renders the improvements permit requirement applicable, other provisions satisfied, to "any mobile home intended for use as a dwelling." In 28 C.J.S. *Dwelling*, it is stated:

"In its broadest significance the word denotes a building used as a settled human abode; any building, edifice, or structure enclosed with walls and covered, whatever may be the materials used for building; and, in common parlance, when not qualified, conveys the notion of a home."

The use of the word "dwelling" conveys the intent of the Legislature to limit the applicability of the Article to permanent structures and mobile homes intended for use as homes and living quarters. Therefore, the Article is inapplicable to mobile homes placed on a lot for storage and for sale and is inapplicable to mobile homes intended for uses other than as homes and living quarters. In

G.S. 130-166.26 and G.S. 130-166.27, the words "mobile home" are not modified by the words "intended for use as a dwelling" or "intended to be used as a dwelling" as in G.S. 130-166.25 and G.S. 130-166.28. Nevertheless, it is clear that the Legislature defined the scope of the words "mobile home" in G.S. 130-166.25(a) and that where these words are subsequently used in the Article they should be construed in this context. The Legislature intended, by the enactment of Article 13C, to establish a procedure whereby the health authorities could inspect and approve a site before an improvements permit was issued for installation of a ground absorption disposal system and then inspect and approve the installation of the system before the conventional dwelling or mobile home was occupied. It would be anomalous to conclude that the Legislature intended to require a certificate of completion where it did not require an improvements permit.

Robert Morgan, Attorney General
Robert R. Reilly
Associate Attorney

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29 May 1974

Subject: Taxation; Privilege License Tax; Pinball
Machines; Bagatelle Tables; Levy of Tax by
City on Each Machine; G.S. 105-66.

Requested by: Mr. Henry W. Underhill
Charlotte City Attorney

Question: Whether a city of 10,000 population or
over can levy under the provisions of
G.S. 105-66 a license tax upon the
operation of pinball machines at the rate
of \$25.00 upon each pinball machine
operated within the city?

Conclusion: A city of 10,000 population or over, under
the provisions of G. S. 105-66 may not
levy a license tax upon the operation of

pinball machines at the rate of \$25.00 upon each pinball machine operated within the city, but may levy a tax not in excess of that levied by the State for each location at which such machines are operated.

G.S. 160A-211 provides that "except as otherwise provided by law, a city shall have power to levy privilege license taxes on all trades, occupations, professions, businesses, and franchises carried on within the city." However, the extent of this general taxing power is limited with respect to the operation of a place for other games or play by G.S. 105-66, the specific statute which levies a State license tax on places for other games or play, and which provides that cities may levy a license tax on the business taxed under this section but "not in excess of that levied by the State." The State presently levies a license tax and issues a license under the provisions of G.S. 105-66 that provides "a place for other games or play", on the operation of pinball machines which are coin operated machines which are "designated and manufactured to be played for amusement only and the operation of which depends in part upon the skill of the player." G.S. 14-306.

G.S. 105-66 provides as follows:

"§ 105-66. *Bagatelle tables, merry-go-rounds, etc.* -

(a) Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round or other riding device, hobbyhorse, switchback railway, shooting gallery, swimming pool, skating rink, other amusements of a like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and procure from the Secretary of Revenue a State license for the privilege of operating such objects of amusement, and shall pay for each subject enumerated the following tax:

In cities or towns of less than 10,000 population	\$10.00
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In cities or towns of 10,000 population and over	\$25.00
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(b) The tax under this section shall not apply to machines and other devices licensed under G.S. 105-64 and 105-65.

(c) Counties, cities or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State."

Thus, a city's authority to levy a license tax on a place for other games or play has been specifically limited by the Legislature to an amount "not in excess of that levied by the State"; consequently, a city of 10,000 or over may not levy a tax on a per location basis in excess of the amount levied by the State on the same location.

Since we are concerned with G.S. 105-66, a bifurcated section, which levies a license tax on a per item basis or upon a per location basis, depending upon within which provision a pinball machine is categorized, it is necessary to determine whether a pinball machine is within the subject category of a bagatelle table or comes within the subject category of a place for other games or play.

Collier's Encyclopedia describes bagatelle as: "a game, like billiards, played with balls and cues on a special table. A cushion at the head of the table is semicircular, and in the bed at the same end are nine or fifteen holes, numbered consecutively so that the higher numbers are in the center of the array. There are nine balls, two colored and seven white, of ivory or composition, somewhat smaller than carom billiard balls. Bagatelle tables vary in length from ten to fifteen feet. A string line parallel to the foot marks off an area within which balls are 'dead'. The player strikes a colored ball with his cue, endeavoring to drive the other colored ball and the white balls into the pockets. Scoring may be based solely on the number of balls pocketed, or on the numbers of the pockets also. In most games, no white ball may be struck directly by the cue ball; the other colored ball must be hit first." Geoffrey Matt-Smith,

"Bagatelle", *Collier's Encyclopedia*, 1966, Vol. 3, p. 458.

Encyclopedia Britannica describes bagatelle as: "a game probably of English origin, is very likely a modification of billiards, and is played on an oblong board or table varying in size from 6 ft. by 1-1/2 ft. to 10 ft. by 3 ft. Ordinary billiard cues and nine balls, one black, four red and four white, are used. The black ball is placed upon a spot about 9 in. in front of hole 1, and about 18 in. from the player's end of the board. A line (the balk) is drawn across the board, from behind which the players shoot. *Bagatelle Proper.* — The black ball having been placed on the upper spot, the players 'string' for the lead, the winner being that player who plays his ball into the highest hole. Any number may play. Each player in turn plays all eight balls up the table, no score being allowed until a ball has touched the black ball, the object being to play as many balls as possible into the holes, the black ball counting double. The game is decided by the aggregate score made in an agreed number of rounds." "Bagatelle", *Encyclopedia Britannica*, 1971, Vol. 2, p. 1024.

Webster's Third New International Dictionary (G. & C. Merriam Co. 1961) defines bagatelle as "a game played with a cue and usually nine balls on an oblong table having cups or both cups and arches at one end."

Berman v. Prendergast, 338 Ill. App. 580, 88 N.E. 2d 374 (1949) states that the term "bagatelle" is "a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player ..."

Webster's Third New International Dictionary defines "pinball machine" as: "an amusement device often used for gambling that consists of a glass-topped cabinet in which a ball propelled by a plunger rolls down a slanting surface among an arrangement of pins and targets with each contact between ball and target scoring a number of points indicated by a system of electric lights."

Giomi v. Chase, 47 N.M. 22, 132 P. 2d 715 (1942) states that,

"A machine commonly known as a 'pinball machine' is one which the player, by depositing a five cent (5) coin in a slot, puts five (5) steel balls, one and one-fourth inches (1-1/4") in diameter, onto the field of play. The player, by pulling a spring actuated plunger, throws the steel ball against a wooden ark or flange in the upper end of a tilted table, which table is twenty-three (23) inches wide and seventy (70) inches long, and upon which are various rubber bumpers which deflect the balls in various and unpredictable directions. The ball goes through various lanes between the bumpers and by coming in contact with different bumpers, a score is registered from the contacts made."

Pepple v. Headrick, 128 P. 2d 757, 64 Idaho 132 (1942) states:

"The pinball machines are of comparatively recent introduction to the public and are the progeny of the well-known omnipresent slot machine, — simply a specie of that numerous family."

State v. Langley, 115 SE 2d 308, 236 S.C. 583 (1960) states:

"A pinball machine has been described as one in use of which the player after depositing a coin in the slot, puts balls in play by pulling a spring actuated plunger on a tilted table upon which there are bumpers which deflect balls in various directions through various lanes, producing a score registered from contact with different bumpers."

Based upon differences in the size of the playing surface and in the size and color of the balls used, upon differences in the manner in which the balls are put in play, upon the fact that one surface is flat and one is tilted, upon the unlike methods of scoring, upon the fact that one cabinet is glass-topped and the other is not, and upon the fact that one is provided with electrified scoring devices and the other is not, we do not believe that "pinball machines" and "bagatelle tables" are "amusements of a like kind", bearing in mind that taxing statutes are strictly construed, with doubts being resolved in favor of the taxpayer. To the extent that it is in conflict herewith, the opinion of this Office dated 4 September 1969 to Mr. Benton H. Walton, III, is modified.

Robert Morgan, Attorney General
Norman L. Sloan
Associate Attorney

3 June, 1974

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Subject: Marriage; Validity; Performed in County
Other than Where License was Issued;
Penalty; Officer Performing Ceremony

Requested by: Mr. W. G. Massey
Register of Deeds
Johnston County

Questions: (1) What is the legal status of a marriage
performed in a county other than the
county where the license was issued?

(2) To what penalty, if any, is the
officiating officer who performed the
ceremony subject?

Conclusions: (1) The marriage is valid.

(2) The officiating officer would be
subject to the penalties imposed by
G.S. 51-7.

G.S. 51-6 states in part:

"No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy."

Question first arises as to the meaning of the phrase "intended to take place". In 46 C.J.S., *Intend*, it is stated that "'Intended' has

been held synonymous with 'contemplated' ... and 'knew'." "Intended" is also used to distinguish the future from the present. It is the opinion of this Office that G.S. 51-6 requires the marriage license to be issued in the county in which the marriage takes place.

Question then arises as to the effect which this noncompliance with G.S. 51-6 has upon the validity of the marriage. In *Maggett v. Roberts*, 112 N. C. 71, 16 S. E. 919 (1893), wherein the Supreme Court found a license invalid, the Court stated:

"The marriage under an invalid license, or with no license, as has been repeatedly held, would be good, if valid in other respects." (at 84)

The Supreme Court held in *Hall v Hall*, 250 N. C. 275, 108 S. E. 2d 487 (1959), that "failure to file a health certificate as required by law (G.S. 51-14) does not invalidate an otherwise legal marriage." (at 276 and 277) It is the opinion of this Office, in light of the Supreme Court decisions cited previously and of the Court's similar decisions in *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628 (1922), and *Sawyer v. Slack*, 196 N. C. 697, 146 S. E. 864 (1929), that the performance of the marriage ceremony in a county other than the one in which the license was issued does not affect the validity of the marriage.

In *Maggett v. Roberts*, *supra*, the Court stated:

"The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of \$200 prescribed by The Code, sec. 1817." (at 84 and 85)

G.S. 51-7 now contains the penalty provisions which were in The Code, sec. 1817 (1883). A license issued in a county other than the county in which the ceremony is to be performed would not be a license, as required by law; and, therefore, a minister or officer who marries a couple with such a license would be subject to the penalties imposed by G.S. 51-7.

Robert Morgan, Attorney General
Robert R. Reilly
Associate Attorney

3 June 1974

Subject: State Departments, Institutions and Agencies; Real Property, North Carolina Land Conservancy Corporation

Requested by: Mr. Robert Hunter, Special Assistant
Department of Natural and Economic Resources

Questions: Chapter 1405, Session Laws of 1974, codified as Chapter 113A, Article 8, G.S. 113A-135 through -143, creates the North Carolina Land Conservancy Corporation for the avowed purpose of acquiring land "for eventual use by the State of North Carolina".

(1) Does Section 9 of that Act limit the authority of the Corporation unilaterally to expend funds acquired from *private* sources for the acquisition of real property?

(2) Under the Act, can the Corporation obtain general prior approval of the Council of State for the expenditure of a fixed amount of *private* funds in real property acquisition in a designated project, the Corporation to determine the individual properties to be acquired and the amounts to be expended in such acquisitions or must the Corporation obtain individual prior Council of State approval of each acquisition?

(3) The Act contains a conflict of interest provision which precludes the Corporation from dealing with businesses in which designated individuals hold a financial interest of any kind. What is meant by the term "financial interest of any kind" appearing there?

Conclusions:

(1) No. Section 9 of the Act applies only to "appropriated State funds". However, Section 10 of the Act applies to *private* as well as public funds and prohibits purchases, leases, sales, assignments, mortgages and options on land "by the Corporation without prior approval of the Council of State".

(2) The Corporation must obtain individual prior Council of State approval of each acquisition.

(3) The term "financial interest of any kind" is extremely broad. *Words and Phrases* states it is "an interest in the nature of an investment". Certainly, it would include any proprietary interest by which the owner thereof stands to receive monetary gain.

As to Conclusion 1, Section 9 of the Act is expressly limited to expenditures of "*appropriated State funds*" and thus would not apply to *private* funds donated to the Corporation. Section 10 is not so limited and would apply to *all* funds in the hands of the Corporation.

As to Conclusion 2, the initial broad language of Section 10 might admit of a general grant of Council of State approval but for the accompanying language "and no options shall be taken on any land by the Corporation without the prior approval of the Council of State". The term "option" when applied to real property to paraphrase *Black's Law Dictionary* (Fourth Edition - West Publishing Co.-1951) means a privilege existing in one person, for which he has paid money, which gives him the right to *buy* certain specified real property from another person, if he chooses at any time within an agreed period, at a fixed price. Clearly this portion was intended to refer to individual transactions. Since the section must be construed as a whole, the reasonable inference of legislative intent is that each of the designated transactions must receive individual Council of State prior approval.

As to Conclusion 3, the term is so broad as to include virtually any interest of ownership by which designated owners stood to realize monetary gain from a transaction with the Corporation. By way of example, it has been held that an attorney named as executor of an estate with his fee fixed by the will held a financial interest in the estate. In *Re Smalls Estate* (D.C.D.C.) 346 F. Supp. 600, 601.

Examples of financial interest would be: beneficiary of a trust; trustee of a trust entitled to fees for his services, general or limited partner in a partnership, owner of stock in a profit making corporation.

Robert Morgan, Attorney General
T. Buie Costen
Assistant Attorney General

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11 June 1974

Subject: Public Officers and Employees; Obligation
of Public Officials to Warn Employees of
Dangerous Devices

Requested by: Mr. David Hayes
Director of Management Analysis
Department of Transportation and
Highway Safety

Question: Upon the receipt of a "bomb threat" in
a State government building, what are the
obligations of the responsible officials to
personnel occupying the building?

Conclusion: Upon receiving notice of a possible hidden
dangerous device in a State building, the
responsible official should notify the
employees of that building of the possible
hidden dangerous device and request that
the employees leave the building in

question. The employees should remain out of the building until a thorough search by persons trained in searching and detecting such devices is conducted, and it is determined by the responsible official that it is safe for the personnel to return to work in the building.

The obligation of the responsible officials in case of a "bomb threat" is not covered by the General Statutes. Although a procedure has been established for some buildings and for some agencies in State government, this Office is not aware of any uniform procedure established to be followed in case of a "bomb threat", involving a State building. The North Carolina Appellate Courts have not had an occasion to rule upon the question presented. However, in the absence of other directions, it may be helpful to review some of the established legal principles involving employee and employer relationship and the obligation of an employer for the safety of his employees.

The employer is not an insurer of the safety of his employees but is liable for injury to the employee resulting from the employer's negligence in failing to exercise ordinary care under the circumstances to provide the employee a reasonably safe place to work and prevent the employee from being subjected to unreasonable risks or dangers. *Young v. Barrier*, 286 N. C. 406 (1966).

Should a responsible official fail to notify his employees of the presence of a possible explosive device and should the device subsequently explode and cause death or injury to an employee, such an official could be liable as an individual for the resulting injuries. In the absence of a statutory or other prescribed directions for the responsible official to follow, the standard generally applied as a guide is that which an ordinary prudent man would do under the circumstances. Under the circumstances of a threat to detonate an explosive device in a public building, the responsible official in exercising ordinary care should warn the employees of the explosive device and require them to evacuate the building. A thorough search of the building should be conducted by personnel trained in searching and detecting explosive devices. After the search is

completed and no explosive device is found, the responsible official should authorize the employees of the building to return to work after a determination by him that it is safe to do so. The determination of the responsible official should only be made after considering all of the circumstances and information available to him.

Negligence is the failure to exercise that degree of care for others' safety which a reasonably prudent man under like circumstances would exercise. Negligence has also been defined as the failure to exercise proper care in the performance of some legal duty which the defendant owes the injured party under the circumstances in which they are placed. Negligence to be actionable must be the probable cause of the injury and foreseeability is an essential element of probable cause. The law requires only that a person anticipate those consequences which in the ordinary recourse of human experience may reasonably be expected to result in injury to others. North Carolina Index, 2d, Volume 6, Negligence, Sec. 1.

Should the responsible official after the receipt of a "bomb threat" intentionally fail to notify the employees and occupants of the building, such official could be criminally responsible in the event the "bomb" or device did explode causing injury or death. Involuntary manslaughter, a felony, is the unintentional killing of a human being without malice, premeditation or deliberation, which results from the performance of an act in a culpably negligent way. *State v. Rummage*, 280 N. C. 51 (1971). Culpable negligence under the criminal law is a reckless and careless act done with thoughtless disregard of consequences or the heedless indifference to the safety and rights of another which causes injury or death. *State v. Lilley*, 3 N. C. App. 276 (1968). Therefore, the intentional failure to notify employees of the possible presence of a dangerous explosive device could be an act which could be a violation of the criminal law.

The Secretary of the Department of Administration is the appropriate State official to establish a procedure consistent with the generally accepted standards and principles indicated herein in cases of bomb threats, and to designate a responsible official or officials for carrying out the procedures established. This opinion supersedes an informal opinion of this Office dated May 22, 1973,

and it is written for the purpose of clarifying questions arising subsequent to that opinion.

Robert Morgan, Attorney General
R. Bruce White, Jr.
Deputy Attorney General

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11 June 1974

Subject: Municipal Corporations; Conflict of Interest; Member of Redevelopment Commission Prohibited from Purchasing Property in the Redevelopment Project

Requested by: Mr. Charlie B. Casper
City Attorney Asheboro

Question: May a member of a Redevelopment Commission purchase property in the redevelopment area from the Redevelopment Commission or from the redeveloper?

Conclusion: No. A member of a Redevelopment Commission is prohibited by G.S. 160A-511 from acquiring any interest, direct or indirect, in any property included or planned to be included in a redevelopment area and he may not contract with a redeveloper, directly or indirectly, relating to any redevelopment project.

The language of G.S. 160A-511 is clear and specific in its prohibition of a member of a Redevelopment Commission acquiring any interest, direct or indirect, in any property included or planned to be included in any redevelopment area and this prohibition would include purchasers of property in the area from the Commission or from the redeveloper. The acquisition of any such interest in

a redevelopment project or contract shall constitute misconduct in office. In addition, the acquisition of property in the redevelopment area would possibly be a conflict of interest prohibited by G.S. 14-234.

Robert Morgan, Attorney General
James F. Bullock
Deputy Attorney General

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11 June 1974

Subject: Licenses and Licensing; State Board of Embalmers and Funeral Directors; G.S. 90-210, et seq.; Licensing of Instructors of Embalming and Registration Certificates of the Related Teaching Institution

Requested by: Mr. William R. Hoke
Jordan, Morris and Hoke
Counsel to the State Board of Embalmers and Funeral Directors

Questions: (1) Are embalming instructors employed by Fayetteville Technical Institute required to be licensed as embalmers?

(2) Is Fayetteville Technical Institute required to obtain a registration certificate as a "funeral establishment" prior to offering instructions in embalming?

Conclusions: (1) Yes.

(2) No.

The plain and unequivocal language of the pertinent statutory provisions governs this opinion. G.S. 90-210 states that "No person shall engage in the practice of embalming without first obtaining

the license herein provided." There are no exceptions to this directive. Therefore, those instructors involved in the embalming process must be licensed.

G.S. 90-210.17(c) states that "Each *funeral establishment* shall apply to the Board for a registration certificate on forms to be provided by the Board . . ." (Emphasis added)

Subsection (a) defines "funeral establishment" to be "a place of business used in the care and preparation for burial or transportation or other disposal of dead human bodies or any place or premises at or from which any person or persons shall represent himself or themselves or hold out himself or themselves as being engaged in the profession of funeral directing." From this language it can be concluded that since Fayetteville Technical Institute is not a "place of business" there is no requirement for a registration certificate. This opinion remains consistent with the stated objects and purposes of the Embalmers and Funeral Directors Act that only qualified persons be permitted to practice embalming.

Robert Morgan, Attorney General
Keith L. Jarvis
Associate Attorney

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24 June 1974

Subject: Drugs; Authority for Scheduling; Drug
Authority; Commission for Health Services;
Statutory Construction

Requested by: Mr. F. E. Epps, Director
North Carolina Drug Authority

Question: Does Section 15 of Chapter 1358 of the
1973 Session Laws transfer the authority
to administer those portions of the
Controlled Substances Act (Chapter 90,
Article 5) having to do with the scheduling
of controlled substances under that Act

from the North Carolina Commission for Health Services to the North Carolina Drug Authority?

Conclusion:

Section 15 of Chapter 1358 of the 1973 Session Laws does transfer the authority to administer those portions of the Controlled Substances Act (Chapter 90, Article 5) having to do with the scheduling of controlled substances under that Act from the North Carolina Commission for Health Services to the North Carolina Drug Authority.

Section 15 of Chapter 1358 of the 1973 Session Laws states:

"Sec. 15. Article 5 of Chapter 90 of the General Statutes is hereby amended by changing the words 'North Carolina Commission for Health Services' wherever they appear in Article 5, Chapter 90 of the General Statutes, 'North Carolina Controlled Substances Act' sections 90-86 and 90-113.1, to the words 'North Carolina Drug Authority' and 'Drug Authority'."

An interpretation of this Section is necessary for codification purposes because of the use of the conjunction "and" in the phrase "sections 90-86 *and* 90-113.1", (emphasis added) since the words "North Carolina Commission for Health Services" and "Commission for Health Services" appear in neither G.S. 90-86 nor G.S. 90-113.1, so that, construed literally, the Act would be meaningless.

It is an established rule of construction that a legislative act is presumed to have meaning and will be upheld if that meaning may be ascertained with reasonable certainty by proper construction. In ascertaining that meaning, the intent of the legislature is controlling.

The fact that the words "North Carolina Commission for Health Services" and "Commission for Health Services" do not appear in either G.S. 90-86 or G.S. 90-113.1, together with the use of the words "*wherever they appear* in Article 5, Chapter 90 of the General

Statutes, North Carolina Controlled Substances Act" (emphasis added) is compelling evidence that the intent of the legislature was to make the changes specified in the Act applicable to those sections of Chapter 90, Article 5, in which the words "North Carolina Commission for Health Services" and "Commission for Health Services" appear in Article 5 of Chapter 90, excepting G.S. 90-113.2 through G.S. 90-113.8.

The effect of this Act is, therefore, to transfer from the North Carolina Commission for Health Services to the North Carolina Drug Authority the authority to administer those portions of the Controlled Substances Act (Chapter 90, Article 5) having to do with the scheduling of controlled substances under that Act.

Robert Morgan, Attorney General
Ann Reed
Assistant Attorney General

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24 June 1974

Subject: Juveniles; Sheriffs; Authority to
Apprehend and Return Children to
Training School

Requested by: Mr. C. G. Wimberly, Sheriff
Moore County

Questions: (1) May a county sheriff apprehend and
return runaway children to a State training
school?
> (2) What force may be used by a sheriff
in apprehending and returning a runaway
child to a training school?

Conclusions: (1) A county sheriff may apprehend and
return runaway children to a State training
school.

(2) A sheriff may use such force as may be reasonably necessary under the circumstances to apprehend and return a runaway child to a training school.

The first question is controlled by G.S. 134-23. This statute is entitled "Return of runaways" and reads as follows:

"If a boy or girl runs away from a State school, institution or agency, the director thereby may cause him or her to be apprehended and returned to such school, institution or agency. Any employee of the school, institution or agency, or any person designated by the director, or any official of the Department of Human Resources, *or any peace officer* may apprehend and return to the school, institution or agency, without a warrant, a runaway boy or girl in any county of the State, and shall *forthwith* carry such runaway to the school, institution or agency." (Emphasis added.)

This statute is clear and in no manner ambiguous. Under its provisions not only is a sheriff authorized to apprehend without warrant such child, but is directed to return him to the school immediately.

With respect to Question No. 2, a sheriff, or other peace officer, may use such force as may be necessary to overcome resistance in discharging his duty, *State v Brannon*, 234 N.C. 474, 67 S.E. 2d 633 (1951), but may not use greater force than is reasonable and necessary under the circumstances. *State v Fain*, 229 N.C. 644, 50 S.E. 2d 904 (1948). Whether the force used is excessive is a question to be determined by the jury. *State v Eubanks*, 209 N.C. 758, 184 S.E. 839 (1936).

In our opinion a sheriff, or other law enforcement officer, may use whatever force is reasonably necessary to apprehend and return a runaway child to a State training school; however, liability may exist if force greater than is reasonable and necessary under the circumstances is used.

Robert Morgan, Attorney General
Parks H. Icenhour
Assistant Attorney General

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24 June 1974

Subject: Motor Vehicles; Driver's License; Granting of Limited Driving Privilege by District Court Judge After Trial De Novo in Superior Court

Requested by: Honorable John Clifford
District Court Judge

Question: May a judge of the district court grant a limited driving privilege to a defendant tried before him after an appeal de novo to the superior court and upon conviction when the trial judge in the superior court refuses to grant the defendant a limited driving privilege?

Conclusion: No. Upon appeal and trial de novo in the superior court, the district court was divested of jurisdiction. The slate, having been wiped clean by the exercise of his absolute right of appeal and trial de novo, the superior court judge was the trial judge for the purpose of G.S. 20-179(b). *State v. Speights*, 280 N.C. 137; *State v. Spencer*, 276 N.C. 535; and *State v. Coffey*, 14 N.C. App. 642, cert. den., 281 N.C. 624.

Robert Morgan, Attorney General
William W. Melvin
Assistant Attorney General

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